

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

BRIEF FOR APPELLANT

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17471

425

CHARLES EINBINDER, DEPUTY COMMISSIONER, APPELLANT

v.

NOVINGER COMPANY, INC. and U. S. FIDELITY AND
GUARANTY CO., APPELLEES

On Appeal from the United States District Court
for the District of Columbia

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for the District of Columbia Circuit

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QUESTIONS PRESENTED

1. Whether the record considered as a whole supports the Deputy Commissioner's finding that the employee sustained a permanent partial disability arising out of and in the course of his employment.

2. Whether the Deputy Commissioner's finding of reduced earning capacity is compatible with the fact that the employee's post-injury wages equalled or exceeded pre-injury wages.

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On Appeal from the United States District Court
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BRIEF FOR APPELLANT

JURISDICTIONAL STATEMENT

This is an appeal from an order of the United States District Court for the District of Columbia, entered on September 4, 1962 (J.A. 9), granting appellees' motion to set aside the Deputy Commissioner's compensation award in favor of an injured employee and permanently enjoining him from enforcing the award. Notice of appeal was filed on November 2, 1962 (J.A. 153). The jurisdiction of the district court was invoked under the Longshoremen's and Harbor Workers' Compensation Act, 44 Stat. 1424, as amended, 33 U.S.C. 901, made

applicable to the District of Columbia by 36 D.C. Code 501 (J.A. 3). The jurisdiction of this Court rests on 28 U.S.C. 1291.

STATEMENT OF THE CASE

This action was instituted on January 19, 1962, by appellees, the employer and insurance carrier, to set aside and enjoin the payment of a workmen's compensation award, dated December 22, 1961, which ordered the payment of \$3,718.77 to an employee of appellee, Novinger (J.A. 6). The award represents 191 accrued weekly payments of \$19.47 for a 20% permanent partial disability from April 21, 1958 to December 17, 1961 (J.A. 12, 13).¹ Continuing payments of \$19.47 per week were also ordered. The Deputy Commissioner's award was based on the following findings:

On March 28, 1958, the claimant, while performing services as a metal lather for appellee, Novinger, fell about eighteen inches from a scaffold to the floor, landing on his hands and knees. Subsequently, on the same day, claimant experienced severe pain in his lower back while pulling channel iron (J.A. 10, 11). As a result of this exertion following the fall, claimant sustained personal injury resulting in his disability and a "trauma to the back, including a sprain of the lumbosacral area of the back superimposed on a congenital anomaly affecting the lumbar spine area of the third and fourth lumbar vertebrae," and culminating in a "chronic back strain" (J.A. 11). The injury arose out of and in the course of employment (J.A. 11).

Shortly after the injury, which occurred late in the day, claimant went home and did not return to work until April 21, 1958 (J.A. 21). There is no dispute that during this period claimant was totally disabled (J.A. 11). The Deputy Commissioner awarded \$185.14 (\$54 per

¹ There was no dispute as to the occurrence of the accident, some initial injury, and the immediate effects of the injury, for which a temporary total disability award went unchallenged. The dispute centers on the scope and long range effects of the injury.

week for 3-3/7 weeks) for the period of temporary total disability (J.A. 12).

The Deputy Commissioner found that the injury of March 28, 1958, resulted in continuing pain and restricted work activities for claimant during the period following his return to work to the date of the award and that claimant had a 20 percent permanent partial disability.² He further found that post-injury wages, equalling or exceeding pre-injury wages, do not fairly represent claimant's wage-earning capacity as reduced by the injury and the resulting degree of physical impairment, as it may extend into the future and as it may affect his usual employment (J.A. 11, 12). Pursuant to section 8(h) of the Longshoremen's Act (*infra* p. 4), the Deputy Commissioner fixed the claimant's post-injury earning capacity at \$116.80 per week (J.A. 12). Pre-injury wages had averaged \$146 per week (J.A. 12, 15). The weekly amount awarded for permanent partial disability represents 66-2/3 of \$29.20—the difference between pre-injury wages and post-injury reduced earning capacity (J.A. 12).

In the district court appellees attacked the award for permanent partial disability on the grounds that the injury of March 28, 1958, did not result in permanent partial disability and that claimant did not sustain a loss of earning capacity (J.A. 5, 6).

Appellant's motion for summary judgment was denied on June 8, 1962 (J.A. 2). On September 4, 1962, the district court issued an order, without opinion, granting appellees' motion to set aside the award for permanent partial disability and to enjoin the Deputy Commissioner from enforcing the award (J.A. 37).

² At the hearing before the Deputy Commissioner, claimant pressed an alternate claim for the period following December 3, 1958, against a second employer. Since the Deputy Commissioner found the entire period of partial disability to relate to the injury of March 28, 1958, the second employer is no longer involved in this proceeding. References in the testimony in the Joint Appendix to an incident of December 3, 1958, relate to this alternate claim.

STATUTES INVOLVED

The Longshoremen's and Harbor Workers' Compensation Act, March 4, 1927, 44 Stat. 1424, as amended, 33 U.S.C. 901, made applicable to the District of Columbia by 36 D.C. Code 501, provides in pertinent part:

Section 2(10), 33 U.S.C. 902(10):

"Disability" means incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment.

Section 8, 33 U.S.C. 908:

Compensation for disability shall be paid to the employee as follows:

* * *

(c) Permanent partial disability: In case of disability partial in character but permanent in quality the compensation shall be $66\frac{2}{3}$ per centum of the average weekly wages * * *.

* * *

(21) Other cases: In all other cases in this class of disability the compensation shall be $66\frac{2}{3}$ per centum of the difference between his average weekly wages and his wage earning capacity thereafter in the same employment or otherwise * * *.

* * *

(h) The wage-earning capacity of an injured employee in cases of partial disability under subdivision (c) (21) of this section or under subdivision (e) of this section shall be determined by his actual earnings if such actual earnings fairly and reasonably represent his wage-earning capacity: *Provided, however,* That if the employee has no actual earnings or his actual earnings do not fairly and reasonably represent his wage-earning capacity, the deputy commissioner may, in the interest of justice, fix such wage-earning capacity as shall be reasonable, having due regard to the nature of his injury, the degree of physical impairment, his usual employment, and any other factors or circumstances in the case which may affect his capacity to earn wages in his disabled

condition, including the effect of disability as it may naturally extend into the future.

Section 21(b), 33 U.S.C. 921(b).

If not in accordance with law, a compensation order may be suspended or set aside, in whole or in part, through injunction proceedings, mandatory or otherwise, brought by any party in interest against the deputy commissioner making the order, and instituted in the Federal district court for the judicial district in which the injury occurred (or in the United States District Court for the District of Columbia if the injury occurred in the District) * * *.

36 D.C. Code 501, 45 Stat. 600 (May 17, 1928) provides in pertinent part:

The provisions of Chapter 18 of Title 33, U.S. Code, including all amendments that may hereafter be made thereto shall apply in respect to the injury or death of an employee or an employer carrying on any employment in the District of Columbia, irrespective of the place where the injury or death occurs * * *.

STATEMENT OF POINTS

1. The district court erred in failing to conclude that the Deputy Commissioner's finding of employment-connected permanent partial disability was supported by substantial evidence.

2. The district court erred in concluding that a finding of reduced earning capacity was precluded by the fact that the employee's post-injury wages equalled or exceeded pre-injury wages.

3. The district court erred in failing to conclude that the Deputy Commissioner's finding of reduced earning capacity was supported by substantial evidence.

SUMMARY OF ARGUMENT

It is well settled that findings and conclusions of the Deputy Commissioner under the Longshoremen's Act must

be accepted by a reviewing court if they are supported by substantial evidence and in accordance with law. *Voris v. Eikel*, 346 U.S. 328 (1953); *O'Leary v. Brown-Pacific-Maxon*, 340 U.S. 504 (1951); *Cardillo v. Liberty Mutual Co.*, 330 U.S. 469 (1947); *Del Vecchio v. Bowers*, 296 U.S. 280 (1935); *Voehl v. Indemnity Insurance Co. of N.A.*, 288 U.S. 162 (1933); *United Painters & Decorators v. Britton*, 112 U.S. App. D.C. 236, 301 F. 2d 560 (1962); *Phoenix Assurance Co. of N. Y. v. Britton*, 110 U.S. App. D.C. 118, 289 F. 2d 784 (1961); *Carson v. Cardillo*, 77 U.S. App. D.C. 82, 132 F. 2d 604 (1942). In the instant case the record furnishes ample support for the findings that the employee continues to have back trouble, that said back trouble was caused by the injury of March 28, 1958, and that the back trouble constitutes permanent partial disability under the Act.

The finding of permanent partial disability was in accordance with law. The Deputy Commissioner's finding of permanent partial disability, i.e., reduced earning capacity, is compatible with the fact that the employee's post-injury wages equalled or exceeded pre-injury wages. The Longshoremen's Act explicitly directs the Deputy Commissioner to base his findings of wage-earning capacity on factors other than actual post-injury wages. This Court and the other courts which have considered the problem, have consistently construed the Act to mean that the test of disability is not actual wages, but earning capacity, and that a finding of reduced earning capacity is compatible with actual post-injury wages which equal or exceed pre-injury wages. *Liberty Mutual Ins. Co. v. Britton*, 100 U.S. App. D.C. 236, 243 F. 2d 659 (1957); *Liberty Mutual Ins. Co. v. Britton*, 98 U.S. App. D.C. 208, 233 F. 2d 699, certiorari denied, 352 U.S. 918; *Hartford Accident & Indemnity Co. v. Hoage*, 66 App. D.C. 163, 85 F. 2d 420 (1936); *Travelers Ins. Co. v. McLellan*, 288 F. 2d 250 (C.A. 2, 1961); *Lumber Mutual Cas. Ins. Co. v. O'Keefe*, 217 F. 2d 720 (C.A. 2, 1954); *Burley Welding Works v. Lawson*, 141 F. 2d 964 (C.A. 5, 1944); *Twin Harbor Stevedoring & Tug Co. v. Marshall*, 103 F. 2d 513

(C.A. 9, 1939); *Luckenbach S.S. Co. v. Norton*, 96 F. 2d 764 (C.A. 3, 1938).

The Deputy Commissioner's finding of reduced earning capacity is thus in accordance with law and, since it is supported by substantial evidence, it was binding on the district court.

ARGUMENT

As noted above, the district judge filed no written opinion. The record, therefore, does not reveal on what ground the compensation award was set aside. In view of this circumstance, we shall address our brief to each point in appellees' complaint challenging the Deputy Commissioner's award. Those points are: (1) the evidence failed to show that the employee sustained an employment-connected injury which resulted in permanent partial disability; (2) the evidence failed to show that the employee sustained a loss of earning capacity; (3) the employee did not sustain a loss of earning capacity as a result of an employment-connected injury. We shall demonstrate that the Deputy Commissioner's award is not subject to attack on any of these grounds, that the award was clearly correct, and that there is no basis in law or in the evidence for the district court's action in setting aside the award.

I

The Scope of Review Open To the District Court In Workmen's Compensation Cases Is Narrowed To An Examination of Whether the Deputy Commissioner's Findings Are Supported By Substantial Evidence or Whether the Deputy Commissioner Has Misconstrued the Law

Review of workmen's compensation cases by the district court is exceedingly limited in scope, and the limits of judicial inquiry in these cases have been carefully delineated by the Supreme Court. The findings of the Deputy Commissioner must be accepted by the reviewing court if

those findings are supported by substantial evidence. *Del Vecchio v. Bowers*, 296 U.S. 280 (1935); *Voehl v. Indemnity Ins. Co.*, 288 U.S. 162 (1933). Even those findings which depend upon inferences drawn from the facts must be accepted unless unsupported by substantial evidence on the record as a whole. *O'Leary v. Brown-Pacific-Maxon*, 340 U.S. 504 (1951). This is so because the standards applied in drawing these inferences "are not so severable from the experience of industry nor of such a nature as to be peculiarly appropriate for independent judicial ascertainment as 'questions of law.'" *Id.* at 507-508. And, it is not material that a different inference, or even the opposite inference, might be reached from the same facts. *Cardillo v. Liberty Mutual Co.*, 330 U.S. 469 (1947). In short, the Deputy Commissioner's award, if supported by substantial evidence, can only be set aside for an error of law, "such as a misconstruction of the Act." *Voris v. Eikel*, 346 U.S. 328 (1953).

The principles enumerated above have been consistently applied by this Court. See, e.g., *United Painters & Decorators v. Britton*, 112 U.S. App. D.C. 236, 301 F. 2d 560 (1962); *Phoenix Assurance Co. v. Britton*, 110 U.S. App. D.C. 118, 289 F. 2d 784 (1961); *Carson v. Cardillo*, 77 U.S. App. D.C. 82, 132 F. 2d 604 (1942).

We shall show in points II and III that the findings of the Deputy Commissioner were in accordance with law and were supported by substantial evidence, and that, in setting aside the award, the district court failed to observe the principles governing its role in this case, as set forth above.

II

The Finding of Employment-Connected Permanent Partial Disability Was Supported By Substantial Evidence and Was Therefore Conclusive On Judicial Review

The Deputy Commissioner found that the claimant suffered a permanent partial disability in connection with his employment, i.e., that he sustained a permanent back

injury as the result of the accident of March 28, 1958, which restricts his work activities. Upon an examination of the administrative record, it is manifest that this finding is supported by substantial evidence. Any holding to the contrary by the district court is clearly error.

Mr. Dailey, the claimant, testified before the Deputy Commissioner that from the date of the accident to the time of the hearing he has had pain in his back whenever he bends down, or, after sitting a while, when he straightens up (J.A. 22, 37, 101-102); that prior to the accident he had no such difficulty or pain (J.A. 39); that work as a metal lather involves a good deal of bending and carrying of heavy tools (J.A. 24, 31); that he has had to keep working, despite the pain, in order to support his large family (wife and seven children) (J.A. 22, 42-43) and has been able to do so because various people have either helped him by doing the bending work for him (J.A. 23, 26) or by giving him jobs, such as foreman, for which no strenuous exercise is needed (J.A. 24, 37-38); that he had stopped work from December 3, 1958, to June 29, 1959, because of a recurrence of severe pain brought on by excessive bending (J.A. 26-34); that he had stopped seeking medical aid at various times up to and after the spring of 1960 because of the expense and because the pain was not crippling during the periods when he did no bending (J.A. 37-38, 99-101); that the medical care he had received gave only temporary relief (J.A. 40); and that he was continuing to use a heating pad and to take hot baths at home for relief of the pain (J.A. 40-41).

Mrs. Dailey testified that prior to the accident the claimant had not suffered from back trouble and had been very active (J.A. 120-121); that since the accident he had suffered extreme pain and was subject to attacks of quivers following exertion or lack of rest, although such attacks were less frequent as of the date of the hearing (J.A. 121-126); and that claimant's physical activities, including heavy repair work around the house, had been restricted by the pain (J.A. 121).

Mr. Haak, a co-worker and acquaintance of about 14 years, testified to the absence of any back complaints by Mr. Dailey prior to the accident (J.A. 108) and to the presence of such complaints on the job after the accident (J.A. 106-107). He further testified that lathing work involves bending (J.A. 106); and that he had tried to ease the job for Mr. Dailey by giving him work which did not require getting on and off a scaffold (J.A. 106).

Dr. Weaver, claimant's physician prior to the accident, who initially treated claimant after the accident and had seen claimant last in May 1961, testified that in his opinion claimant had chronic back strain (J.A. 88-91), which he attributed to the March 28, 1958 injury, diagnosed by him as acute right lumbosacral strain, with some sciatic neuritis in the right leg (J.A. 81, 95); that in his opinion, claimant was totally disabled for heavy work at the time of the hearing (J.A. 93-94); and that he could not predict when or if the condition would clear up (J.A. 94).

Appellees introduced testimony of two doctors. One, Dr. Tiddler, who had treated claimant for several months opined that claimant's present trouble was due to a congenital anomaly rather than to the accident of March 28, 1958 (J.A. 52-53). The other, Doctor Murphy, a neurosurgeon who had examined claimant on one occasion, testified that in his opinion claimant was not disabled (J.A. 129) but emphasized that the congenital anomaly could in no way be a contributing factor to claimant's trouble (J.A. 136, 142, 143).

It thus is clear that the record made before the Deputy Commissioner contained substantial evidence supporting the finding of continued, permanent, pain and restricted physical activities resulting from the accident. It may be argued that the record contains evidence in conflict with this finding. However, as we have demonstrated (*supra* pp. 7-8), it was for the Deputy Commissioner to resolve any conflict in the evidence. The scope of review open to the district court did not allow it to redetermine this factual matter.

III

The Finding of Reduced Earning Capacity Was In Accordance With Law and Supported By Substantial Evidence and Was Therefore Conclusive On Judicial Review

We have shown in point II that the Deputy Commissioner's finding of permanent injury was supported by substantial evidence. Injury alone, however, does not justify a disability award. In addition, there must be a reduction of earning capacity before an award can be made. The Deputy Commissioner found such a reduction of earning capacity and, accordingly, awarded compensation. The compensation award was attacked by appellees in the district court on two grounds:

- (1) There was no evidence to show a loss of earning capacity
- (2) There was no loss of earning capacity as a result of an employment-connected injury.

The first ground is directed to the fact that the claimant's post-injury wages equalled or exceeded pre-injury wages. We shall show that, as a matter of law, a finding of reduced earning capacity is consonant with this state of facts, and that the finding, in this case, was supported by substantial evidence. Any holding to the contrary by the district court was manifestly error.

Appellees' second ground of attack appears to question the relationship between the reduced earning capacity, as found by the Deputy Commissioner, and the accident of March 28, 1958. That the *injury* was a result of the accident was shown in point II. That the *reduction in earning capacity* was a result of the injury, as found by the Deputy Commissioner, is demonstrated by the evidence supporting the finding of reduced earning capacity, itself.

A. *The Finding of Reduced Earning Capacity Was in Accordance with Law and Could Not Be Reversed by the District Court*

Disability is defined in section 2(10) of the Longshoremen's Act as "incapacity because of injury to earn the wages which the employee was receiving at the time of injury * * *." The Deputy Commissioner found a 20% reduction of earning capacity, despite the fact that the employee's post-injury wages equalled or exceeded pre-injury wages (J.A. 11-12). In so doing, the Deputy Commissioner followed the mandate of the Longshoremen's Act, which provides explicitly in section 8(h) that, where actual wages do not represent wage-earning capacity, the Deputy Commissioner may fix capacity on the basis of such factors as degree of impairment, usual employment, and any other factors, including the effect of disability as it may extend into the future. In sum, the Act expressly states that not *actual wages* but *wage-earning capacity* shall be the test of disability. And wage-earning capacity may depend on various factors. The unreliability of actual wages, alone, as a gauge of earning capacity stems from the many variables which may account for the actual wages, such as a general rise in wages in the industry, greater maturity and training of the claimant, payment of disproportionate wages from motives of sympathy, and the unpredictable and precarious nature of such post-injury earnings. Larson, *Workmen's Compensation Law*, §57.21 (1961).

This Court has fully explored the question and recognized that actual wages are not the test of disability. In *Hartford Accident & Ind. Co. v. Hoage*, 66 App. D.C. 163, 85 F. 2d 420 (1936), after a well-reasoned review of the authorities, this Court upheld an award for partial disability despite the fact that the injured employee continued to receive the same wages after his injury from a sympathetic employer and despite the fact that the Act did not then contain the section 8(h) test for determining wage-earning capacity. And in *Liberty Mutual Ins. Co. v. Britton*, 100 U.S. App. D.C. 236, 243 F.

2d 659 (1957), citing present section 8(h), this Court recognized that the Deputy Commissioner's finding of wage-earning capacity is a factual determination which is conclusive, if supported by substantial evidence.

Other circuits which have considered the question have concurred in the rule that equal or higher post-injury wages are not incompatible with a finding of reduced earning capacity. One of the relevant considerations is the possibility that an employer may seek to avoid his obligation under the Act by paying pre-injury wages until the time limit for submitting claims has expired. See *Twin Harbor Stevedoring & Tug Co. v. Marshall*, 103 F. 2d 513 (C.A. 9, 1939); *Luckenbach S.S. Co. v. Norton*, 96 F. 2d 764 (C.A. 3, 1938); *Travelers Ins. Co. v. McLellan*, 288 F. 2d 250 (C.A. 2, 1961); *Lumber Mutual Cas. Ins. Co. v. O'Keefe*, 217 F. 2d 720 (C.A. 2, 1954); *Burley Welding Works v. Lawson*, 141 F. 2d 964 (C.A. 5, 1944). The finding of reduced earning capacity was thus in accordance with law and could not be overturned if supported by substantial evidence. As we shall now show, there was substantial evidence supporting this finding. It was, therefore, error for the district court to rule to the contrary.

B. The Finding of Reduced Earning Capacity As a Result of Employment Connected Injury Was Supported by Substantial Evidence and Was Therefore Binding on Judicial Review

The following uncontradicted evidence in the record supports the finding that the employee's post-injury wages do not fairly represent his present earning capacity: *Mr. Dailey*, the claimant, testified that since the accident he has been able to keep working, despite the back condition because his fellow workers have helped him (J.A. 23) by doing the jobs which require bending (J.A. 26) and because he has been given jobs as foreman, which require less physical activity (J.A. 24, 37-38) and that his work since the accident has been lighter than it was before the accident (J.A. 38, 100); that there has been a

wage increase in his industry (J.A. 38); and that, except for the period of December 3, 1958, to June 29, 1959, when he was prevented from working by pain, he had tried to work steadily because with his large family he could not afford to be out of work (J.A. 22, 42-43). *Mrs. Dailey*, claimant's wife, testified that since the accident the claimant cannot do the kind of heavy work which he did before the accident (J.A. 121). *Mr. Haak*, co-worker and supervisor on one job, testified that, knowing of Mr. Dailey's injury, he gave him work which did not involve jumping on and off a scaffold; that normally, lathers have to work from scaffolds (J.A. 106).

The foregoing testimony illustrates the precarious nature of post-injury wages and outlines the very situation which section 8(h) was intended to cover. The evidence is substantial and uncontradicted that the claimant's earning capacity had been reduced despite the fact that actual wages remained the same or higher through a combination of fortuitous circumstances—sympathetic foremen, co-workers and employers, who enabled the claimant to avoid heavy work, and a general rise in industry wages. The claimant's inability to perform the heavy work required in his occupation—work which he had been able to perform before, but not after, the accident—was clearly caused by the pain which the Deputy Commissioner found to be the result of the accident (see point II, *supra*). Not only was claimant's physical activity restricted during periods when he actually worked, but, it is to be remembered, claimant was unable to work for over six months—December 3, 1958 - June 29, 1959—because of severe pain (J.A. 33-34). The Deputy Commissioner was entitled to take into account all these factors, including the unpredictable future course of the employee's injury, in fixing a reasonable figure for the employee's wage-earning capacity, under section 8(h) of the Act. This Court has recognized that a determination by the Deputy Commissioner of reduced earning capacity is a factual finding which must be accepted if supported by substantial evidence. *Liberty Mutual Ins. Co. v. Britton*, 100 U.S. App. D. C. 236, 243 F. 2d 659 (1957). Since

the undisputed, substantial evidence supports the Deputy Commissioner's finding of reduced earning capacity, that finding was binding on the district court.

CONCLUSION

For the foregoing reasons, we respectfully submit that the judgment of the district court should be reversed and the case remanded with instructions to reinstate the Deputy Commissioner's award.

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BRIEF FOR APPELLEES, U. S. FIDELITY & GUARANTY
CO. AND NOVINGER COMPANY, INC.

IN THE
United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17,471

CHARLES EINBINDER, Deputy Commissioner, *Appellant*,

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NOVINGER COMPANY, INC.,

and

U. S. FIDELITY AND GUARANTY Co., *Appellees*.

Appeal from the United States District Court for the
District of Columbia

United States Court of Appeals
for the District of Columbia Circuit

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QUESTIONS PRESENTED

1. Whether the record considered as a whole supports the Deputy Commissioner's findings that the employee sustained a permanent partial disability and reduced wage-earning capacity as a result of an injury while employed by the appellee.

2. Whether the trial court properly entered summary judgment for the plaintiff below.

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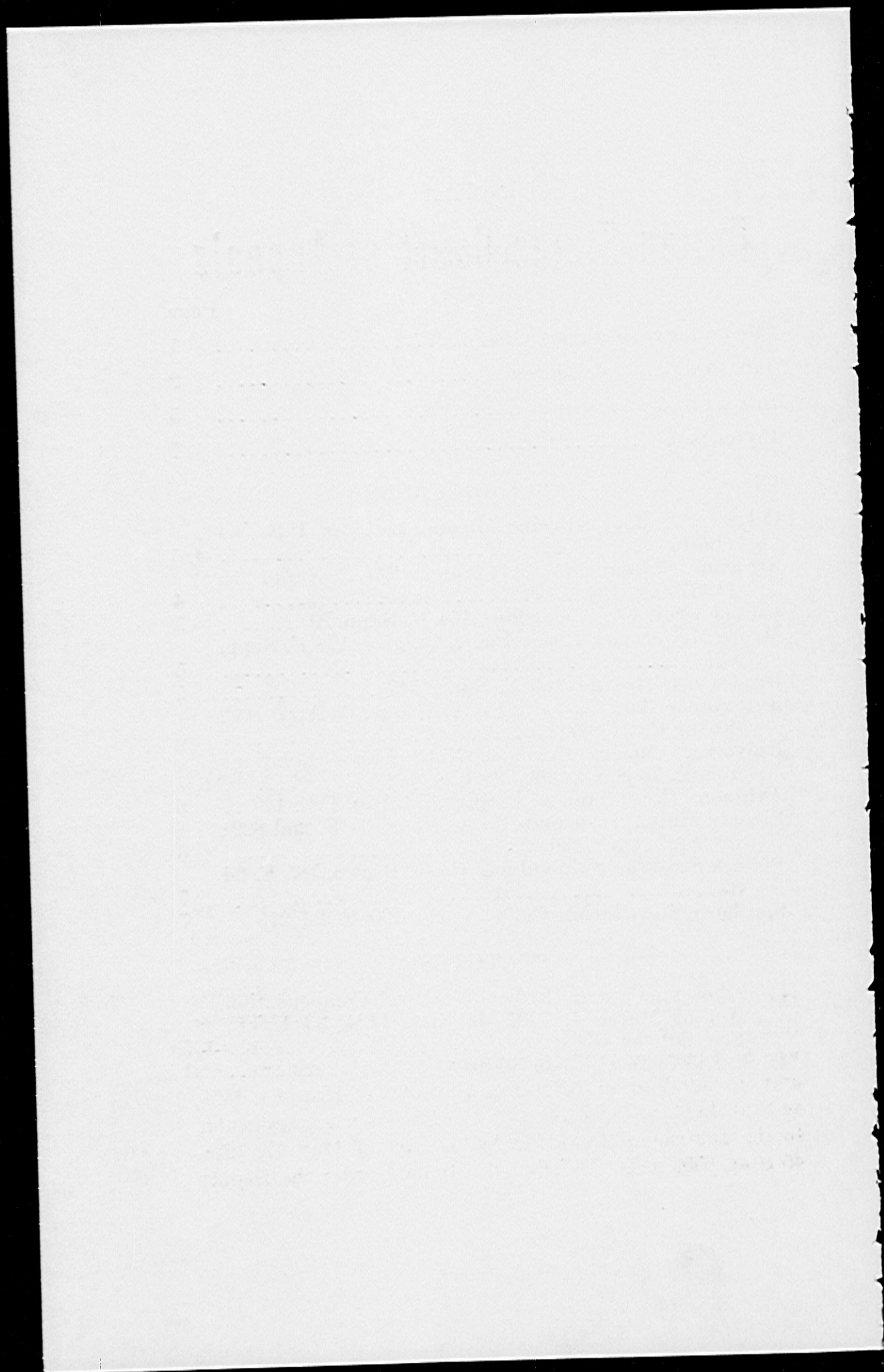
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IN THE
United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17,471

CHARLES EINBINDER, Deputy Commissioner, *Appellant*,

v.

NOVINGER COMPANY, INC.,

and

U. S. FIDELITY AND GUARANTY Co., *Appellees*.

Appeal from the United States District Court for the
District of Columbia

BRIEF FOR APPELLEES, U. S. FIDELITY & GUARANTY
CO. AND NOVINGER COMPANY, INC.

COUNTERSTATEMENT OF CASE

This cause arose upon a complaint filed on January 19, 1962, by the employer and insurance carrier to review and set aside as not in accordance with law a compensation order filed on December 22, 1961, by Charles Einbinder, Deputy Commissioner, Bureau of Employees' Compensation, United States Department of Labor. Said complaint was filed pursuant to the provisions of the Longshoremen's and Harbor Workers' Compensation Act of March 4, 1957, 44 Stat. 1424, 33 U.S.C., Sec. 901 *et seq.*, as made applicable to the District of Columbia by the Act of May 17, 1928, 45 Stat. 600, 36 D. C. Code 501. In said order the Deputy

Commissioner awarded workmen's compensation benefits to W. E. Dailey, hereinafter referred to as "Claimant" or "employee" for total disability from March 28, 1958, to April 20, 1958, and permanent partial disability thereafter.

The Court below, upon review of the record, granted appellees' motion to set aside the deputy commissioner's award and to enjoin him from enforcing the award.

THE COMPENSATION ORDER

The compensation order complained of reads in pertinent part as follows:

1. That on March 28, 1958, the claimant above named was in the employ of the employer above named, whose address is 3801 Cedarcroft Place, Brentwood, Maryland; that the employer was subject to the provisions of an Act of Congress, approved May 17, 1928, entitled "An Act to Provide compensation for disability or death resulting from injury to employees in certain employments in the District of Columbia, and for other purposes"; that the liability of the employer for compensation under the said Act was insured by the United States Fidelity and Guaranty Company;

2. That on the said day the claimant herein, while performing services for the employer as a metal lather at the employer's work project in the District of Columbia, fell about eighteen inches from a scaffold to the floor, landing on his hands and knees and subsequently, while pulling channel iron on the same day, namely, March 28, 1958, sustained personal injury resulting in his disability when he experienced a severe pain in his lower back, as a consequence of which he suffered trauma to the back, including a sprain of the lumbosacral area of the back superimposed on a congenital anomaly affecting the lumbar spine area of the third and fourth lumbar vertebrae, and culminated in the development of a chronic back strain; that the injury arose out of and in the course of the employment;

3. That written notice of injury was not given to the employer within thirty days, but that the employer had knowledge of the injury and has not been prejudiced by the lack of such written notice;

4. That the employer furnished the claimant with medical treatment and care in accordance with the provisions of section 7(a) of the Act;

5. That the average weekly earnings of the claimant herein at the time of the injury were \$146;

6. That as a result of the injury the claimant was wholly disabled from March 28, 1958, to April 20, 1958, inclusive, a period of 3-3/7 weeks and for such temporary total disability he is entitled to compensation at the maximum rate of \$54 per week, in the amount of \$185.14;

7. That as a further result of the injury the claimant is continuing to experience pain in the lower part of his back and his work activities have been restricted; that the claimant's average weekly wages since termination of temporary total disability on April 20, 1958, have been equal to or in excess of his average weekly wages at the time of the injury, but that such wages do not fairly and reasonably represent his wage-earning capacity as diminished by the injury; that the claimant's partial disability is a result of the injury; that such partial disability is permanent and the claimant is entitled to compensation therefor under section 8(c)(21) of the Act; that, having due regard to the nature of the injury, the degree of physical impairment, his usual employment, and in view of other factors which may affect his capacity to earn wages in his disabled condition, including the effect of such disability as it may naturally extend into the future, the claimant's wage-earning capacity is, in the interest of justice, fixed under Section 8(h) of the Act at \$116.80 per week, based on a 20 per cent permanent partial disability; that for the period from April 21, 1958, to December 17, 1961, inclusive, he is entitled to compensation for such permanent partial disability at the rate of \$19.47 per week, (66 2/3 per cent of \$29.20, the difference between his average weekly wage of \$146 and his reduced weekly earning capacity of \$116.80); that accrued compensation for permanent partial disability from April 21, 1958, to December 17, 1961, inclusive, a period of 191 weeks at the rate of \$19.47 per week, amounts to \$3,718.77; that accrued compensation for temporary total and permanent partial disability to December 17, 1961, inclusive, amounts to \$3,903.91; that the employer and the insurance carrier have paid to the claimant \$162 as compensation.

SUMMARY OF ARGUMENT

The evidence in the record considered as a whole does not support the Deputy Commissioner's findings that the claimant is permanently partially disabled as a result of his injuries while in the employ of the Novinger Company, Inc., or that the claimant's wage-earning capacity was in any manner impaired.

It is basic that the Deputy Commissioner's findings must be supported by the record considered as a whole. *O'Leary v. Brown-Pacific Mazon, Inc.*, 340 U.S. 504 (1951), is one of a host of cases supporting this view. The case of *Strachan Shipping Co. v. Calbeck*, reported at 190 F. Supp. 255 (1961—Jan. 18) contains an excellent statement by that court of what the function of reviewing courts should be in compensation cases. The Court says:

"The applicable standard of review—substantial evidence on the record as a whole—received its outstanding interpretation in *Universal Camera Corp. v. NLRB*—1951, 340 U.S. 474, 71 S. Ct. 496, 95 L. Ed. 456. The Court made clear it was no longer permissible to consider simply that evidence which supported the administrator, but that the entire record must be examined and due appraisal made of proof which detracted from the weight of the evidence in support of the controverted order. A court was to set aside an administrative decision which it could not conscientiously find supported by substantial evidence. Reviewing courts were not to abdicate the conventional function of the judiciary in an excess of accommodation to administrative expertise. The standard enunciated in *Universal Camera* and in the Administrative Procedures Act was designed to thwart the practice of some administrators and agencies of relying upon surmise, suspicion, and incredible evidence. An award against an employer, precisely and simply because he was an employer was no longer to be tolerated."

ARGUMENT

From a consideration of the testimony taken before the Deputy Commissioner it is clear that the claimant, W. E. Dailey, sustained an injury on March 28, 1958. It is equally clear from this record that there were no permanent residuals of this injury. The statute in Longshoremen's and Harbor Worker's Compensation Act of March 4, 1927, 44 Stat. 1424, 33 U.S.C. Sec. 901 et seq., provides "Disability means incapacity because of injury to earn the wages which the employee was receiving at the time of the injury in the same or any other employment." See *United Fruit Co. v. Cardillo*, 104 F. Supp. 81.

The record in this case is replete with testimony by the claimant himself that during the period of time during which the Deputy Commissioner made an award of permanent partial disability, he was doing the same type of work that he was doing at the time of his alleged injury and that his wages were the same or greater. See T. 29, 32, 38, 39, 52, 61, 59, & 60; J. A. 26, 27, 28, 30, 37, 38, 43, 44, & 45. The instant case is strikingly similar to *Moore McCormack Lines, Inc. v. Quigley*, 178 F. Supp. 837, wherein the claimant worked as a carpenter and prior thereto as a carpenter foreman. He sustained a back injury, had an operation and returned to work. He was assigned by his employer to the same position he held at the time of the accident. Since the time of the accident, however, his wages had increased. The Court in that case held that in order for the Deputy Commissioner to make an award of compensation based upon this statement of facts there must be a showing, some rationale, for the finding of fact that his actual wages did not truly represent his wage-earning capacity. The Court pointed out the language of the statute as did the Court in *Brown v. O'Hearne*, 160 F. Supp. 517, and stated that the language was plain and direct in the statute and should not be lightly regarded by fact-finding boards in arriving at their decisions. If the evidence at the hearing held by the Deputy Commissioner was such that in order to sustain

his findings of fact he has to enter the field of speculation and conjecture, this award must be set aside. As stated also by our Court of Appeals in *New Amsterdam Casualty Co. v. Hoage*, 60 App. D. C. 40, 46 F. 2d 837, "An award based on conjecture is not in accordance with law." It is respectfully submitted that the Deputy Commissioner's findings that the claimant sustained a permanent partial disability as a result of injury cannot be sustained on the record considered as a whole. The evidence from the claimant himself is to the contrary and there is ample testimony of medical witnesses indicating the claimant has no permanent disability from the alleged incident.

It is respectfully submitted that the court below properly in the exercise of its judicial function set aside the award of the Deputy Commissioner in this case in accordance with its obligation to do so upon a finding that the record considered as a whole does not support the findings of the Deputy Commissioner.

The appellees are not unmindful of the standard of judicial review in cases of this nature. It is fundamental, however, that there be some material relationship between the employee's condition and the accident in employment before it can be said by the Deputy Commissioner that the injury complained of gave rise to any permanent disability. It is equally fundamental that these findings must be based upon substantial evidence considering the record as a whole. See *Universal Camera Corp. v. Nat'l Labor Relations Board*, 70 S. Ct. 998, 339 U.S. 962, and *O'Leary v. Brown-Pacific Mazon, Inc.*, 340 U.S. 504 (1951). To hold otherwise is to disregard entirely the evidence and the "common sense" of this case. See *Avignone Freres, Inc. v. Cardillo*, 73 App. D.C. 149.

The trial court, in a suit to set aside a compensation award has the duty to determine from the record whether the evidence given before the Deputy Commissioner will sustain his finding. *Liberty Mutual Insurance Co. v. Hoag*, 65 F. 2d 822; 62 App. D.C. 189. And such evidence must

be substantial evidence. *Pollack Stockton Shipbuilding Co. v. Brown*, 185 F. 2d 37. If the Deputy Commissioner ignores proper evidence presented before him in a Compensation proceeding, it is error of law and the District Court should give relief if prejudice results therefrom. It is the duty of the Court to determine whether an award is in accordance with the law and whether the findings of fact are justified by sufficient substantial evidence because a finding without substantial evidence to support it is not in accordance with the law and the court must set it aside. *Southern Stevedoring Co. v. Voris*, 190 F. 2d 275.

As stated by the Court in *Universal Camera Corp. v. Nat'l Labor Relations Board*, *supra* "Substantial evidence is more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion". The Court went on to say further that, "A reviewing Court is not barred from setting aside a board decision when it cannot conscientiously find that the evidence supporting that decision is substantial when reviewed in the light that the record in its entirety furnishes, including the body of, evidence opposed to the board's view . . .". It is respectfully submitted that the Court below correctly applied these standards in determining the merits of the appellees' Motion for Summary Judgment.

CONCLUSION

It is respectfully submitted therefore that the findings of the Deputy Commissioner are not supported by substantial evidence on the record considered as a whole and that they were properly rejected by the court below. This Honorable Court on its judicial review should sustain the action of the Court below.

Respectfully submitted,

M. S. MAZZUCHI
405 Investment Building
Washington 5, D. C.
Attorney for Appellees.

JOINT APPENDIX

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17,471

CHARLES EINBINDER, DEPUTY COMMISSIONER,
APPELLANT,

v.

NOVINGER COMPANY, INC., ET AL.,
APPELLEES.

**ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF COLUMBIA**

United States Court of Appeals
for the District of Columbia Circuit

FILED JAN 21 1963

FRANK OF BROWN & ALLEN, WASHINGTON, D.C.

CLERK

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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17,471

CHARLES EINBINDER, DEPUTY COMMISSIONER,
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v.

NOVINGER COMPANY, INC., ET AL.,
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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF COLUMBIA

JOINT APPENDIX

Docket Entries

CIVIL DOCKET

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF
COLUMBIA

DATE	PROCEEDINGS
1962	Deposit for cost by
Jan. 19	Complaint, appearance Exhibit. filed
Jan. 19	Summons, copies (2) and copies (2) of Complaint issued served 1-23-62; U.S. Atty. ser. 1-22-62 Atty. Gen. ser. 1-24-62.
Jan. 25	Amended complaint; c/m 1-25-62. filed
Mar. 23	Stipulation of debt and pltfs extending time to answer to and including 4/23/62; appearance of Ellen Lee Park. filed
Apr. 17	Motion of debt to dismiss as to pltf #2; P&A; appearance of David C. Acheson, Charles T. Duncan, Joseph M. Hannon, Ellen Lee Park; MC 4/17/62. filed
Apr. 17	Motion of debt for summary judgment; P&A; statement; c/m 4/17/62; exhibits 1, 1A, MC 4/17/62. filed
Apr. 19	Stipulation extending to 5/1/62 time for pltfs to answer motion to dismiss and until 5/5/62 to answer motion for summary judgment. filed
May 1	Opposition of pltfs. to debt's motion to dismiss; c/m 5-1-62. filed
May 15	Stipulation extending time for pltf to answer motion for summary judgment until 6/1/62. filed
May 29	Opposition of pltf to debts motion for summary judgment; c/m 5/29/62; P&A. filed
June 8	Order denying motion of debt for summary judgment. (N) Hart, J.

DATE

PROCEEDINGS

- June 25 Answer of defendant to complaint; c/m 6-25-62;
appearance of David C. Acheson, Charles T.
Duncan, Joseph M. Hannon & Ellen Lee Park.
filed
- June 25 Calendared (N).
- June 27 Motion of plaintiff to set aside compensation
order; c/m 6-26-62; P&A; M.C. 6-27-62. filed
- July 5 Opposition of defendant to plaintiff's motion
to set aside compensation order; P&A; c/m
7-5-62. filed
- Sept. 4 Order granting plttfs' motion to set aside the
compensation order, setting aside order filed
12-22-61 and enjoining deft. (N).
Hart, J.

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF
COLUMBIA

Civil Action No. 223-62

NOVINGER COMPANY, INC. and U. S. FIDELITY & GUARANTY
Co., 2001 Wisconsin Avenue, N. W., Washington, D. C.,
Plaintiff,

vs.

CHARLES EINBINDER, Deputy Commissioner, U. S. Depart-
ment of Labor, Bureau of Employees' Compensation
District, Washington, D. C.,
Defendant.

Amended Complaint

1. Jurisdiction in this Honorable Court is vested through Section 21(b) of the Longshoremen and Harbor Workers Compensation Act (Public Law No. 803, 69th Congress) made applicable to certain employees in the District of Columbia by Act of Congress approved May 17, 1928.

2. Plaintiffs, Novinger Company, Inc., and U. S. Fidelity & Guaranty Company, are corporations with offices and

doing business in the District of Columbia and each of them bring this suit in their own respective right as employer and insurance carrier respectively on the date of injury, to wit, March 28, 1958, and they are hereinafter referred to as employer and insurance carrier.

3. The defendant, Charles Einbinder, is a citizen of the United States and is sued in his official capacity as Deputy Commissioner of the Bureau of Employees' Compensation for the District of Columbia and is hereinafter referred to as the Deputy Commissioner.

4. Pursuant to the Act aforesaid, hereinafter referred to as the "Workmen's Compensation Act" in effect on March 28, 1958, and prior thereto, said insurance carrier issued to the employer a certain policy of insurance securing the payment of compensation in the event of injury or death suffered by an employee and provided by the "Workmen's Compensation Act."

5. On March 28, 1958, one W. E. Dailey, was employed by the plaintiff, Novinger Company, Inc., as a metal lather. On the day and date aforesaid, while performing services for the employer as a metal lather he sustained personal injury when he fell from a scaffold and strained his back. On January 30, 1959, the employee, W. E. Dailey, filed claim against the employer for permanent disability resulting from the injury aforesaid.

6. By reason of the right and duties of the parties aforesaid, the employer and insurance carrier controverted said claim as provided by Section 14, Paragraph d of the "Workmen's Compensation Act" on the ground that the claimant was not disabled to the extent claimed by him, or, in the alternative, any disability which he might have did not arise out of his employment injury.

7. Thereafter, on December 22, 1961, the said Deputy Commissioner made a formal award, a copy of which is attached hereto and made a part hereof by reference, in

which said award, after his findings of fact, said Deputy Commissioner ordered that the plaintiffs pay to the said W. E. Dailey compensation as set forth in the said award. The said plaintiffs believe that the said award is not supported by substantial evidence considering the record as a whole and further allege that the ruling of said Deputy Commissioner is arbitrary and capricious and deprives the plaintiffs herein of due process of law.

8. There was no evidence which would justify the said Deputy Commissioner in finding the following facts:

"That as a further result of the injury the claimant is continuing to experience pain in the lower part of his back and his work activities have been restricted; that the claimant's average weekly wages since termination of temporary total disability on April 20, 1958, have been equal to or in excess of his average weekly wages at the time of the injury, but that such wages do not fairly and reasonably represent his wage-earning capacity as diminished by the injury; that the claimant's partial disability is a result of the injury; that such partial disability is permanent and the claimant is entitled to compensation therefor under section 8 (c) (21) of the Act; that, having due regard to the nature of the injury, the degree of physical impairment, his usual employment, and in view of other factors which may affect his capacity to earn wages in his disabled condition, including the effect of such disability as it may naturally extend into the future, the claimant's wage-earning capacity is, in the interest of justice, fixed under section 8 (h) of the Act at \$116.80 per week, based on a 20 per cent permanent partial disability . . ."

9. The findings of fact and order of the Deputy Commissioner are not in accordance with the law and should be set aside for the following reasons:

a. There is no evidence to show that the employee sustained an injury arising out of and in the course of employment which resulted in permanent partial disability.

b. That there was no evidence to show that the claimant sustained a loss of earning capacity.

c. The employee did not sustain a loss of earning capacity as a result of an employment-connected injury.

WHEREFORE, the premises considered, plaintiffs pray:

1. That a United States writ of subpoena be issued by this Honorable Court against the said defendant, Charles Einbinder, requiring him by a day certain to be therein named to appear herein and answer the exigencies of this bill of complaint.

2. That the said defendant be directed and required to file in this cause a transcript of the testimony adduced before him on August 20, 1961, and October 27, 1961.

3. That payment of the award by the said defendant, Charles Einbinder, be stayed pending final decision therein.

4. That an injunction issue permanently restraining and enjoying the said Deputy Commissioner from carrying into effect any part of the compensation order filed December 22, 1961, and requiring said defendant to vacate and set aside the same en toto.

5. That plaintiffs may have such other and further relief as the nature of this case may require and to this Honorable Court may seem meet and proper.

M. S. M.

M. S. MAZZUCHI

Attorney for Plaintiffs

405 Investment Building
Washington, D. C.

DISTRICT OF COLUMBIA, ss.:

I, M. S. MAZZUCHI, being first duly sworn according to law, upon oath depose and say that I am counsel for the plaintiffs named in the foregoing and annexed bill of complaint and have knowledge of the facts therein stated, and that the statements made therein are true to the best of my knowledge and belief.

M. S. M.

M. S. MAZZUCHI

Answer

The defendant for his answer to the amended complaint herein

1. Admits the allegations in paragraph No. 1 to the effect that jurisdiction of this court with reference to the cause of action of the plaintiff, Novinger Co., Inc. is vested through Section 21(b) of the Longshoremen's and Harbor Workers' Compensation Act as made applicable to certain employees in the District of Columbia by Act of Congress approved May 17, 1928, but defendant denies each and every other allegation in said paragraph.

2. Defendant admits the allegations in paragraphs Nos. 2, 3, 4, 5 and 6.

3. Defendant denies the allegations contained in paragraphs Nos. 7, 8 and 9.

As an affirmative defense defendant alleges that this Court does not have jurisdiction with reference to the action brought by the United States Fidelity & Guaranty Company for the reason that said action was not brought within the time provided in Section 21(b) of the Longshoremen's Act, 33 U.S.C. Sec. 921(b).

For a second defense defendant alleges that the compensation order complained of is in all respects in accordance with law.

WHEREFORE defendant prays that the amended complaint be dismissed.

DAVID C. ACHESON
United States Attorney

CHARLES T. DUNCAN
*Principal Assistant United
States Attorney*

JOSEPH M. HANNON
*Assistant United States
Attorney*

ELLEN LEE PARK
*Assistant United States
Attorney*

Plaintiffs' Motion to Set Aside Compensation Order

Come now the plaintiffs, Novinger Company, Inc., and U. S. Fidelity & Guaranty Co., and move this Court to set aside the compensation order which is the subject matter of the complaint herein and in support thereof refers this Court to its previous order denying the motion of the defendant Einbinder for summary judgment and the points and authorities filed by the plaintiffs herein in support of the plaintiffs' opposition to the defendant's motion for summary judgment.

M. S. MAZZUCHI
M. S. Mazzuchi

Attorney for Plaintiffs

405 Investment Building
Washington 5, D. C.

Points and Authorities

Plaintiffs pray that the points and authorities in support of the plaintiffs' opposition to summary judgment be incorporated herein by reference and made a part hereof as if recited verbatim. (Sec. 921, Longshoremen and Harbor Workers' Compensation Act, 33 U. S. C., Sec. 901 et seq.)

M. S. MAZZUCHI

M. S. Mazzuchi

Attorney for Plaintiffs

405 Investment Building
Washington 5, D. C.

Order

Upon consideration of the motion of plaintiffs to set aside the compensation order filed by defendant Charles Einbinder, the opposition thereto and oral argument of counsel, it is this 4th day of September, 1962

ORDERED that plaintiffs' motion to set aside the compensation order be and the same hereby is granted, and it is

FURTHER ORDERED that the compensation order and award for permanent partial disability filed by the defendant Charles Einbinder herein on December 22, 1961, be and the same hereby is set aside, and it is

FURTHER ORDERED that the defendant be and he hereby is enjoined from enforcing or attempting to enforce said award.

s/ G. L. Ht.

District Judge

UNITED STATES DEPARTMENT OF LABOR
BUREAU OF EMPLOYEES' COMPENSATION
DISTRICT OF COLUMBIA COMPENSATION DISTRICT

In the Matter of

The claim for compensation under the District of Columbia
Workmen's Compensation Act, W. E. DAILEY,
Claimant,

vs.

NOVINGER COMPANY, INC.,
Employer,

UNITED STATES FIDELITY AND GUARANTY COMPANY,
Insurance Carrier.

Compensation Order Award of Compensation Case No. 25033-10

Such investigation in respect to the above-entitled claim having been made as is considered necessary, and hearings having been duly held in conformity with law, and stipulations having been filed by the interested parties, the Deputy Commissioner makes the following

Findings of Fact

1. That on March 28, 1958, the claimant above named was in the employ of the employer above named, whose address is 3801 Cedarcroft Place, Brentwood, Maryland; that the employer was subject to the provisions of an Act of Congress, approved May 17, 1928, entitled "An Act to provide compensation for disability or death resulting from injury to employees in certain employments in the District of Columbia, and for other purposes"; that the liability of the employer for compensation under the said Act was insured by the United States Fidelity and Guaranty Company;

2. That on the said day the claimant herein, while performing services for the employer as a metal lather at the

employer's work project in the District of Columbia, fell about eighteen inches from a scaffold to the floor, landing on his hands and knees and subsequently, while pulling channel iron on the same day, namely, March 28, 1958, sustained personal injury resulting in his disability when he experienced a severe plain in his lower back, as a consequence of which he suffered trauma to the back, including a sprain of the lumbosacral area of the back superimposed on a congenital anomaly affecting the lumbar spine area of the third and fourth lumbar vertebrae, and culminated in the development of a chronic back strain; that the injury arose out of and in the course of the employment;

3. That written notice of injury was not given to the employer within thirty days, but that the employer had knowledge of the injury and has not been prejudiced by the lack of such written notice;

4. That the employer furnished the claimant with medical treatment and care in accordance with the provisions of section 7 (a) of the Act;

5. That the average weekly earnings of the claimant herein at the time of the injury were \$146;

6. That as a result of the injury the claimant was wholly disabled from March 28, 1958 to April 20, 1958, inclusive, a period of 3-3/7 weeks and for such temporary total disability he is entitled to compensation at the maximum rate of \$54 per week, in the amount of \$185.14;

7. That as a further result of the injury the claimant is continuing to experience pain in the lower part of his back and his work activities have been restricted; that the claimant's average weekly wages since termination of temporary total disability on April 20, 1958, have been equal to or in excess of his average weekly wages at the time of the injury, but that such wages do not fairly and

reasonably represent his wage-earning capacity as diminished by the injury; that the claimant's partial disability is a result of the injury; that such partial disability is permanent and the claimant is entitled to compensation therefor under section 8 (c) (21) of the Act; that, having due regard to the nature of the injury, the degree of physical impairment, his usual employment, and in view of other factors which may affect his capacity to earn wages in his disabled condition, including the effect of such disability as it may naturally extend into the future, the claimant's wage-earning capacity is, in the interest of justice, fixed under section 8 (h) of the Act at \$116.80 per week, based on a 20 per cent permanent partial disability; that for the period from April 21, 1958 to December 17, 1961, inclusive, he is entitled to compensation for such permanent partial disability at the rate of \$19.47 per week, (66 $\frac{2}{3}$ per cent of \$29.20, the difference between his average weekly wage of \$146 and his reduced weekly earning capacity of \$116.80); that accrued compensation for permanent partial disability from April 21, 1958 to December 17, 1961, inclusive, a period of 191 weeks at the rate of \$19.47 per week, amounts to \$3,718.77; that accrued compensation for temporary total and permanent partial disability to December 17, 1961, inclusive, amounts to \$3,903.91; that the employer and the insurance carrier have paid to the claimant \$162 as compensation.

Upon the foregoing findings of fact, the Deputy Commissioner makes the following

AWARD

That the employer, Novinger Company, Inc., and the insurance carrier, United States Fidelity and Guaranty Company, shall pay to the claimant herein compensation as follows: For temporary total disability, 3-3/7 weeks at the maximum rate of \$54 per week, from March 28, 1958 to April 20, 1958, inclusive, amounting to \$185.14; and

for permanent partial disability, 191 weeks at the rate of \$19.47 per week, from April 21, 1958 to December 17, 1961, inclusive, amounting to \$3,718.77, or a total of \$3,903.91. The employer and the insurance carrier, having already paid \$162, shall pay forthwith the accrued balance of \$3,741.91; and thereafter shall continue to pay compensation to the claimant at the rate of \$19.47 per week, in biweekly installments, subject to the limitations of the Act or until further order of the Deputy Commissioner:

The employer and the insurance carrier shall continue to furnish the claimant with such necessary medical, surgical, hospital treatment and care as the nature of the injury and the process of recovery may require.

A fee for legal services rendered the claimant in connection with this claim is approved in favor of Samuel Intrater, Esq., 1010 Vermont Avenue, N. W., Washington, D. C., in the amount of \$400, such sum to constitute a lien upon and be paid out of this award.

Given under my hand at Washington, D. C. this twenty-second day of December, 1961

CHARLES EINBINDER

Deputy Commissioner, District of Columbia Compensation District

PROCEEDINGS

THE DEPUTY COMMISSIONER: This is a consolidated hearing and not a consolidated cause of action. I want a record in each claim.

The hearings in these cases are being held upon the application of the Claimant, Mr. W. E. Dailey, 4211 Amendale Road, Beltsville, Maryland.

In the Bureau's File No. 25033-10, it appears that the Claimant on March 28, 1958, while employed by the Novinger Company, Inc., 3801 Cedarcroft Place, Brentwood, Maryland, as a metal lather at a District of Columbia work project for the employer, at an average weekly wage of \$146.00, sustained personal injury resulting in his disability when he fell about 18 inches off a scaffold to the floor, landing on his hands and knees, as a consequence of which he suffered trauma to the back, including acute muscle spasm of the lumbosacral area and a damaged vertebra.

It appears that the employer had immediate knowledge of the injury and furnished the Claimant with medical treatment and care.

The employer's insurance carrier, United States Fidelity and Guaranty Company, voluntarily paid compensation to the Claimant on the basis of temporary total disability for the period from March 28, 1958, to April 20, 1958, inclusive, less the first three days, for a period of
5 three weeks, at the maximum rate of \$54.00 per week, in the sum of \$162.00.

Are the parties in agreement that the statements made are correct, including the average weekly wage of \$146.00 as of March 28, 1958, and the amount of compensation paid?

Mr. Intrater?

MR. INTRATER: That is correct

THE DEPUTY COMMISSIONER: Mr. Mazzuchi?

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THE DEPUTY COMMISSIONER: Back on the record.

Following an off the record discussion, Mr. Mazzuchi, attorney for the respondents in this case, agrees to an average weekly wage of \$146.00 as of March 28, 1958, and both Mr. Intrater and Mr. Mazzuchi have stated that the statements made by the Deputy Commissioner with respect to the amount of compensation paid to Mr. Dailey for the effects of the injury of March 28, 1958, and the average weekly wage of \$146.00 as of March 28, 1958, are correct.

Is that correct, Mr. Intrater?

MR. INTRATER: Absolutely.

THE DEPUTY COMMISSIONER: Mr. Mazzuchi?

6 MR. MAZZUCHI: Yes.

THE DEPUTY COMMISSIONER: On January 30, 1959, the Claimant filed claim for additional benefits under the District of Columbia Workmen's Compensation Act.

Mr. Intrater, please state the claim for this particular case.

MR. INTRATER: Our contention is that Mr. Dailey on March 28th sustained—March 28, 1958, sustained an injury to his back; that thereafter in December there was a flare-up of this condition—

THE DEPUTY COMMISSIONER: December 1958?

MR. INTRATER: That is correct.

(Continuing)—although no new trauma or physical injury occurred at that time.

THE DEPUTY COMMISSIONER: Well, are you claiming temporary total, temporary partial or permanent partial for any particular period?

MR. INTRATER: We are claiming thereafter that—

THE DEPUTY COMMISSIONER: Thereafter? What date?

MR. INTRATER: From December 5, 1958, through April 30, 1959, there was a recurrent temporary total disability, and that since that time there has continued to be a permanent partial disability.

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8 THE DEPUTY COMMISSIONER: Mr. Mazzuchi, what are the grounds of controversy?

MR. MAZZUCHI: That the Claimant's disability, if any he has, is not related to the injury sustained on March 28, 1958.

THE DEPUTY COMMISSIONER: Is that the extent of your controversy?

MR. MAZZUCHI: May I see the Bureau's file a moment. Yes, that is the extent of our claim.

THE DEPUTY COMMISSIONER: Do the parties desire to go to hearing in this case on the issue of extent of disability?

Mr. Intrater?

MR. INTRATER: Yes, sir.

THE DEPUTY COMMISSIONER: Mr. Mazzuchi?

MR. MAZZUCHI: Yes, sir.

I understand that this encompasses, of course, the fact that the injury or condition complained of did not arise out of and in the course of employment.

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9 Mr. Intrater, will you please state the claim in this case?

MR. INTRATER: Our contention is that this injury of March 28, 1958, is the sole injury which occurred; that as a result of this injury in falling from the scaffolding and subsequently attempting to lift a channel iron, the Claimant sustained an injury to his back, including a fracture of the transverse process; that this resulted in a temporary total disability—

THE DEPUTY COMMISSIONER: What is the claim with respect to the alleged injury of December 3, 1958?

MR. INTRATER: It is our contention that there was no subsequent injury as of that time, but that this was all the same injury, but that there was a flare-up of the condition on December 3, 1958.

In other words, there is one injury in this case actually.

THE DEPUTY COMMISSIONER: Is it your contention that the injury of March 28, 1958, was occasioned by some trauma

which occurred to Mr. Dailey while at work for this employer and that, in the alternative, on December 3, 1958, there was either a recurrence or an aggravation of a material injury?

MR. INTRATER: Well, it is our contention that there was a recurrence of the pain, of the original injury.

THE DEPUTY COMMISSIONER: On December 3, 1958?

MR. INTRATER: That is correct.

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13 All right, Mr. Intrater, you may produce your first witness.

Thereupon,

Wilburt Eugene Dailey

was called as a witness for and in his own behalf and, having been first duly sworn by The Deputy Commissioner, was examined and testified as follows:

THE DEPUTY COMMISSIONER: Give the reporter your full name and address.

THE WITNESS: Wilburt Eugene Dailey, 4211 Ammendale Road, Beltsville, Maryland.

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DIRECT EXAMINATION

BY MR. INTRATER:

14 Q. Mr. Dailey, how old are you now? A. Forty-seven.

Q. And when did you reach your 47th birthday? A. July 24th.

Q. What is your occupation or profession? A. Wood, wire and metal lather.

Q. And how long have you been engaged in this? A. About 25 years, something like that.

Q. Are you a member of a union? A. I am a member of the union, Local No. 9.

Q. And that is Local No. 9 of what union? A. Metal Lathers Local No. 9.

Q. How long have you been a member of that union? A. Since about '41; about '41.

Q. Now, in March of 1958 for whom were you working? A. In March of '58?

Q. Yes. A. Novinger Company.

Q. How long had you been working for them? A. Since September, I guess.

Q. That is the previous September, September of '57? A. That would be correct.

Q. What was your position with Novinger Company? A. Just a metal lather.

Q. Between September of '57 and March of '58
15 did you receive any type of injury on the job? A. How is that again?

Q. Between September of 1957 and the beginning of March, say March 1, 1958, did you receive any type of injury on the job? A. No.

Q. Had you at any time within the previous year, either for Novinger or anybody else, received any injury on the job? A. No.

Q. Did there come a time in March of 1958 when you were injured? A. Yes.

THE DEPUTY COMMISSIONER: Can you hear him, Mr. Cooney?

MR. COONEY: Yes.

BY MR. INTRATER:

Q. When was that? A. That was March 28th.

Q. What were you doing at the time that you were injured? A. We were working on a corridor from the cafeteria, and in coming off this scaffold at one elevation down to a lower scaffold, there was three trestles and a board laying across these trestles, and the board was taken along the edge of the trestles, and I stepped on it and it tripped me over—

THE DEPUTY COMMISSIONER: Is there any issue on the fact of injury, Mr. Mazzuchi?

16 MR. MAZZUCHI: No sir.

THE DEPUTY COMMISSIONER: There is no issue on the fact of injury, unless you have some purpose for having him describe it.

MR. INTRATER: Yes, sir, I do.

THE DEPUTY COMMISSIONER: Proceed.

BY MR. INTRATER:

Q. What happened after that? A. Well, I just went down on my hands and knees, so I got up and it didn't seem to be hurting too much—

Q. When you got down on your hands and knees, where were you located at that time? A. In the cafeteria.

Q. Had you fallen from the lower scaffold to the floor? A. Yes.

Q. Did you feel anything, any pain? Other than just a normal, slight bruising of the fall, did you feel any pain at that time while you were on your hands and knees? A. No. At that particular time I did not, no.

Q. What happened after you arose to your feet? A. I was on the way to get some channel irons that we use in suspended ceiling work, and the channel iron was laying underneath of some duct work that was piled on top of it. So another fellow and me were pulling at this channel iron to put it—to get it out from underneath the duct work.

17 Q. Who was this other fellow, do you recall? A. DePriest.

Q. And will you describe what happened then? A. While we were pulling trying to get it out, the other fellow came along and had a few corner beads and he had to—he was a laborer there on the job, and he said, I will give you a hand, so he started pulling with us, and while I was pulling, all at once the pain struck me in the back then very severe.

Q. What kind of position, physical position, were you in? A. I was bending and pulling like this (indicating), and had it under my arms, pulling with my arms.

THE DEPUTY COMMISSIONER: Let the record show that the witness was pointing to the right side with his left hand and the channel iron was underneath your left arm?

THE WITNESS: Yes, sir.

THE DEPUTY COMMISSIONER: All right.

BY MR. INTRATER:

Q. How long approximately was it in a matter of time between the time of your fall from the scaffold and— A. (Interposing) I would say I traveled a distance of about 150 feet from where this board turned over, the trestle, to where I went.

Q. And if I understand correctly, immediately after this happened, after you fell from the scaffold, you then
18 got up and walked approximately 150 feet, and it was at that time when you were pulling on the channel iron that you suddenly felt this pain in your back, is that correct? A. That is correct.

THE DEPUTY COMMISSIONER: What part of your back?

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THE DEPUTY COMMISSIONER: At the request of counsel for the Claimant, the witness is now pointing to an area about five or six inches above the waist on the left side.

All right.

BY MR. INTRATER:

Q. Now would you describe the type of pain that
19 you felt at that time? A. Well, it was very severe.

Q. Well, was it sharp in nature, was it localized? Aside from the severity of the pain, how would you describe it? A. It was very severe, and it was at that section in my back.

Q. Where you were pointing? A. Yes, sir.

Q. Did you feel pain in any other section of your back?

A. Well, it was paining so bad, it was paining all over. At that time I was in tremendous pain.

Q. Now, was there anybody else there at the time that you felt this pain? A. Yes.

Q. Who was that? A. Mr. Gray.

Q. Do you know what his job was at that time? A. Laborer.

Q. What did you do after that? A. Well, in a few minutes I got straightened up and I taken—Mr. Gray and Mr. DePriest, they got the iron out from underneath this stuff and they carried it around to where I was working.

Q. Did you leave the job on that occasion? A. No, I did not. I taken and went around to where I had been working, and I got up on the scaffold, and some of the fellows—DePriest, the other fellow I was working with, started to cutting some of the iron, and I tried to reach down and pick it up where it was laying on the scaffold, and I couldn't hardly reach down to get it the pain was so severe.

It was late in the afternoon, just a short while, and one of the fellows I was working with was riding with me, so we went home in just a short while.

Q. Now when did you—did you come to work the next day? A. No.

Q. Did you report your injury at that time? A. Yes.

Q. Now, how long did you stay off work? A. From March 28th to April 21st.

Q. And were you getting medical treatment at that time? A. Yes.

Q. From whom? A. Dr. Frank Weaver.

Q. Where is his office located? A. That is 320 Montgomery Street, Laurel, Maryland.

Q. Had you known Dr. Weaver before this incident? A. He is our family doctor.

Q. Now you said that approximately April 20th was—was that the date you returned to work? A. April 21st.

21 MR. MAZZUCHI: What year?
 THE WITNESS: 1958.

 BY MR. INTRATER:

Q. What was the conditon of your back at that time? A. I still had that pain.

Q. How severe was it at that time? A. Well, it depends on if I——

Q. I am talking not about now, but on April 21, 1958, how bad was the pain? A. Well, it wasn't good, it was quite severe at times.

Q. Now, had you been receiving Workmen's Compensation during the period that you were off work from March 28th until April 21st? A. I did.

Q. Would you describe, under the circumstances, if the pain was still quite bad as you indicated, why you returned to work as of April 21st? A. Well, I will tell you, with a family my size, you have to take and work in order to pay the bills.

Q. What was the size of your family on April 21, 1958? A. Well, I have five in school and two at home, small children, my wife and myself.

Q. So that is you and your wife and seven children? A. That's right.

Q. Including two who were under school age, is
22 that correct? A. That's right.

Q. And during the period that you were off work how much compensation did you receive per week? A. Well, I received \$162.00, which is equivalent I guess to three weeks at \$54.00 a week.

Q. So an average of \$54.00 a week was what you were getting? A. Yes.

Q. As opposed to your earnings of around \$146.00 a week when you were on the job? A. Yes.

Q. Now, after returning to work on April 21, 1958, would you describe thereafter the condition of your back? A. I have trouble bending all the time, and the more I bend or try to bend, the pain gets very severe.

Q. Now, when you went back to work in 1958, wasn't there a great deal of bending and lifting that you had to do on the job? A. Well, yes, there was, but I was working with men that knew that I had this injury, and of course they helped me as best they could.

THE DEPUTY COMMISSIONER: For whom did you go back to work?

THE WITNESS: I went back to work for Novinger.

23 BY MR. INTRATER:

Q. How long thereafter did you continue to work for Novinger? A. 'Til the end of June; sometime in June, I think.

THE DEPUTY COMMISSIONER: June of '58?

THE WITNESS: June of '58, yes, sir.

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Q. Now what was the reason of your terminating your work for the Novinger Company in June of '58? A. In June of '58?

Q. Yes. A. Well, the job was almost complete; the job was almost complete.

Q. Then when you stopped working it did not have anything to do with your back or anything else, it was
24 just the basic completion of the work, is that correct? A. That is right.

Q. When after that did you obtain other work? A. Where?

Q. When, with regard to the date of your termination of work for Novinger? A. I went to work very shortly after that. I don't know whether I was off any days or not, but I went to work very shortly after that.

Q. For whom was that? A. James J. Conroy.

Q. Would you say that the period of time between your working for Novinger and working for Conroy was more or less than a week? A. I would say less.

Q. How long did you work for Conroy? A. Let's see, I would say from June to about in October, I guess.

THE DEPUTY COMMISSIONER: 1958?

THE WITNESS: Yes.

BY MR. INTRATER:

Q. During that period of time that you were working for Conroy, what was the condition of your back? A. Still continued to have pain.

Q. Did you have to do any bending on that job?
25 A. Very little. I was foreman on the job.

Q. Had you at all been foreman before that on the Novinger job? A. I was not foreman on the Novinger job.

Q. Thereafter, how long did you continue to work for Conroy? A. From about June till October.

Q. Now, for whom did you start to work after you left Conroy? A. Lloyd E. Mitchell.

Q. And how soon was it after leaving Conroy that you went to work for Mitchell? A. It was maybe—I would say two weeks maybe, a week to two weeks.

Q. And was that still in the month of October, do you recall? A. Yes, I think it was in October.

THE DEPUTY COMMISSIONER: 1958?

THE WITNESS: '58, yes, sir.

BY MR. INTRATER:

Q. Now, when working for Conroy you had been foreman on the job. What type of work did you get with Mitchell? A. Well, with the tools.

BY THE DEPUTY COMMISSIONER:

Q. Now, at that time did you have bending and
26 straining on your back with Mitchell? A. Well, in all construction work, in lathing there is some bending, yes, sir.

Q. Mr. Dailey, from the time you returned to work for Novinger, your first employer where you suffered an injury on March 28, 1958, I believe you testified in answer to Mr. Intrater's question that you returned on April 21,

1958, and that you worked until sometime in June of 1958. Then shortly thereafter, probably less than a week, you went to work for some company named Conroy, and you worked there until sometime in October, 1958. Then you started to work for Mitchell, the employer in the incident which you allegedly claim was on December 3, 1958.

Now, during all that period from the time you went back to work on April 21, 1958, until you went to work for Mitchell in December of 1958, is it your testimony that your back hurt you? A. Yes.

Q. From the time you went back to work on April 21, 1958, until you went to work for Mitchell where you claim you suffered an injury, or as a result of the work you suffered disability as of December 3, 1958, did you receive any treatment from a doctor? A. Well, during that time and all, I don't know exactly whether I did or didn't. I couldn't answer for sure, but I think probably the records would show it.

27 Q. When was the last time you saw the doctor who treated you for the injury of March 28, 1958?

A. When?

Q. Yes, sir. Do you remember? A. Let's see.

Q. I believe you told Mr. Intrater that the doctor was Dr. Weaver, is that right? A. Dr. Weaver, yes, sir.

Q. Do you know when you last saw Dr. Weaver before you— A. (Interposing) I couldn't give you the exact date.

Q. Did you see him any time after April 21, 1958, until you went to work for Mitchell in 1958? A. I am not real sure whether I did or not. It seems as though I did.

Q. Is it your testimony that you don't know whether you saw a doctor for treatment of your back, which you claim persisted in paining you after April 21, 1958? A. I think I saw someone.

Q. You saw someone? A. I think I did.

Q. After April 21, 1958? A. I can't be real sure.

Q. Do you know whether any doctor gave you any kind of treatment for your back after April 21, 1958? A. No, sir, I am not real sure.

28 Q. When you went back to work for Novinger on April 21, 1958, and you continued in their employment until sometime in June, 1958, did you do the same type of work that you had done for Novinger from September, 1958, until March 28, 1958? A. We were erecting some of the same kind of work, and the two—two of the fellows knew I had got hurt and they helped me very much so I didn't have all the bending to do.

Q. Who was your foreman when you went back to work on April 21, 1958? A. Robert Hall.

Q. Did he favor you in any way because of your injury? A. He did not favor me, no, it was the men I was working with. He did not.

THE DEPUTY COMMISSIONER: Proceed, Mr. Intrater.

DIRECT EXAMINATION (Resumed)

BY MR. INTRATER:

Q. Now during the period from June to October you were not working with tools, you were foreman, correct? A. That's right.

THE DEPUTY COMMISSIONER: That is 1958?

MR. INTRATER: Yes, sir.

BY MR. INTRATER:

Q. Then in October, 1958, when you went to work for Mitchell, you went back to the tools? A. Yes, sir.

29 Q. Now at that time was there anyone who knew of your back condition that was helping you, as you described had happened before when you went back to work for Novinger? A. Well, yes, the man I was working with knew I had a back injury.

Q. Who was that? A. Mr. Bradfield.

Q. And what did he do with regard to helping you? A. Well, instead of getting down to work on the work that we had on the floor, I was working on ceiling work.

Q. And that basically was standing up straight? A. Yes, sir.

EXAMINATION BY THE DEPUTY COMMISSIONER

BY THE DEPUTY COMMISSIONER:

Q. In what way did that differ from the work you did for Novinger from September, 1958, until March 28, 1958?

A. Approximately the same thing, because I still worked on ceiling work.

Q. Now, who was Mr. Bradfield in relation to the Conroy Company? Is he the owner? A. No.

Q. Just a fellow worker? A. I am speaking of Mitchell now. He was Mitchell Company's foreman.

Q. Mr. Bradfield is the foreman for the Mitchell Company? A. For Mitchell.

Q. When you were working for the Conroy Company— A. (Interposing) I was the foreman.

Q. Well, did you have a supervisor? A. I did not; I had a boss.

Q. What was his name? A. James J. Conroy.

Q. Did he know of your back condition? A. He did.

Q. And during the time that you worked for Conroy under the permanent supervision of Mr. James J. Conroy, did you at any time seek out a doctor for treatment of your back? A. I can't say to be sure, but I think yes.

Q. You did? A. I think yes, I am not sure.

Q. Do you know the name of the doctor? A. Let's see. It would either be Dr. Tidler or Dr. Weaver.

Q. You sought these doctors out, or you went to these doctors for treatment of your back? A. Yes, sir.

Q. All right.

And that was after April 21, 1958, until you went to work for the Mitchell Company, is that right? A. Yes.

Q. Do you know how many treatments for your back you received, Mr. Dailey? A. No, I do not.

THE DEPUTY COMMISSIONER: Proceed, Mr. Intrater.

DIRECT EXAMINATION (Resumed)

MR. INTRATER: I would like to clarify one point there.

BY MR. INTRATER:

Q. During this time that you were foreman on the Conroy job, you didn't work with the tools, is that correct? A. No.

Q. You yourself were the supervisor on the job? A. I was supervisor. Once in awhile there would be a little ceiling work that I might help out with, but working steady with the tools I was not.

THE DEPUTY COMMISSIONER: Were you given that job as foreman for Conroy because Mr. James J. Conroy knew about the condition of your back?

THE WITNESS: I had worked for Mr. James J. Conroy for years and years, and he did know about the condition of my back.

THE DEPUTY COMMISSIONER: Did he give you this job because of your skill in your particular work, or because of your impairment in your back?

32 THE WITNESS: He gave this job to me—I had been foreman for Mr. James Conroy for years previous.

THE DEPUTY COMMISSIONER: Proceed.

BY MR. INTRATER:

Q. In other words, the job as foreman was the same job you had had for him before? A. Yes.

Q. And it was not given to you because of sympathy in any way for your physical condition? A. That's right.

THE DEPUTY COMMISSIONER: What was your salary?

THE WITNESS: If the salary was \$152.00, it would be \$172.00 a week.

THE DEPUTY COMMISSIONER: Working for Conroy?

THE WITNESS: Yes, sir.

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33 BY MR. INTRATER:

Q. Now, what happened with regard to your back from October on until—October of 1958 until, say, the first of December of 1958 working for Mitchell. Did anything specific happen to your back? A. No.

THE DEPUTY COMMISSIONER: Do we have the exact date he entered on duty with Mitchell? Do you have the exact date?

THE WITNESS: No. I could get it, but I don't know the exact date.

THE DEPUTY COMMISSIONER: Well, approximately?

THE WITNESS: I would say it was in October.

THE DEPUTY COMMISSIONER: First part or latter part of October, 1958?

THE WITNESS: I would say around the middle. I am not real sure, but I would say around the middle of October.

THE DEPUTY COMMISSIONER: Proceed.

BY MR. INTRATER:

Q. From that time, approximately the middle or latter part of October, '58, until, say, the 1st of December, did you have any specific injury as such to your back? Did anything unusual happen to your back? A. How is that again?

Q. From the time you started to work then for Mitchell until, let's say, December 1st, did you sustain any
34 fall or any injury while bending, or any strain or anything else specific to your back? A. I did not.

Q. Now, did there come a time in December that the acute pain that you had originally experienced recurred? A. Yes.

Q. When was that? A. December 3rd.

THE DEPUTY COMMISSIONER: 1958?

THE WITNESS 1958

BY MR. INTRATER:

Q. What were you doing at that time when this pain recurred? A. I was working in the Casualty Hospital,

and in the walls, and one wall is on the same plane with another, and there is pipes running through. We stripped the metal lath in there, called chases, and I was covering these chases with metal lath to eliminate cracks in the plaster where the plaster was bonded, and I was in the corridor walking—on the floor, not on a scaffold—and stripping these chases which are in the walls, vertical and horizontal where pipes run through and would be flush with the walls and have to be covered for bonding, for plastering, and that is what I was doing.

THE DEPUTY COMMISSIONER: What happened?

35 BY MR. INTRATER:

Q. While you were working on the floor, what happened?

A. Well, you would have to bend down and nail the lath. The chase would start maybe at the floor, some horizontal maybe above the floor—

THE DEPUTY COMMISSIONER: What are chases?

THE WITNESS: A chase is a continuous opening in a wall where they run pipes and ducts and conduits.

THE DEPUTY COMMISSIONER: That is spelled c-h-a-s-e?

THE WITNESS: That's right.

THE DEPUTY COMMISSIONER: Go ahead.

THE WITNESS: They go through a—

THE DEPUTY COMMISSIONER: What were you stripping from these areas?

THE WITNESS: Stripping is nailing metal lath over. It's called stripping, but it don't mean tearing away, it—

MR. INTRATER: That is a word of art in metal lathing.

THE DEPUTY COMMISSIONER: You were nailing lath to the wall?

THE WITNESS: Yes, sir.

THE DEPUTY COMMISSIONER: Is that when you got this pain?

THE WITNESS: Yes, sir.

THE DEPUTY COMMISSIONER: Proceed.

36 BY MR. INTRATER:

Q. What act were you specifically doing when you felt this acute pain? Do you remember? A. Nothing only just nailing the lath over there, just working on nailing the lath on there, which is a thing that is in the trade and all.

THE DEPUTY COMMISSIONER: Were you standing on the floor?

THE WITNESS: Standing on the floor.

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37 BY MR. INTRATER:

Q. What type of tools were you using on this job? A. Snips and a lath hatchet.

Q. Do these tools belong to you personally? A. Yes.

Q. Did you carry them to and from the job each day, or did you leave them on the job? A. Leave them on the job.

Q. Was there a specific warehouse or location where you— A. (Interposing) In the locker room.

Q. And you would pick these tools up in the morning when you went to work? A. Yes, and go wherever you were sent in the building.

Q. Approximately how much did your tool box weigh? A. Thirty-five pounds, or 30 pounds.

Q. And you would then take your tool box completely rather than any particular tool to where you were working from the locker? A. Usually set the box down in the area where you are working and then take the tools out that you need.

Q. Can you state approximately the maximum weight of any one tool, say the heaviest tool that you have that you were working with? A. The lath hatchet would maybe weigh a pound and a half, and the snips might maybe weigh as much as two pounds. It depends on size, I think. I think the size I had was 8-inch.

Q. Q. So you would say any one individual tool, the heaviest would be approximately two pounds? A. Not over.

Q. Not over two pounds? A. Not over.

Q. Now, were you doing the same type of work on December 3, 1958, that you had been doing, let us say, for the week previous? A. Yes.

Q. Were you doing the same type of work that you had been doing throughout the entire job? A. Well, it was different types of work on any job, but most of it
39 was like that, yes, some ceiling work, some wall work, some stripping.

Q. Did you do anything on December 3, 1958, that would entail more physical effort or more of a physical strain on your back than you had been doing throughout the rest of that job? A. I did not.

Q. Now, what was—was there anything specifically that happened at the instant that you first felt this pain on December 3, 1958?

To clarify that, with regard, for example, to the occurrence of March 28, 1958, you testified that you fell from the scaffold and then after immediately walking approximately 100 feet to where this channel iron was, you started attempting to lift and move the channel iron, and at that time, in that act, while pulling on the channel iron you felt this pain. A. Yes.

Q. Now, as an example, there is a specific occurrence, at which time you felt the pain.

Now can you recall whether anything of a like nature, anything specific, any physical act occurred at the time you felt this pain on December 3, 1958? A. No, it was just regular work.

Q. And would you describe the pain that you felt and how it came about? A. Well, I was bending and taking and nailing a lath up on the wall, and the pain just
40 kept getting a little more severe and a little more severe, and it kept on till it got to where I could hardly stand it.

Q. Well, this pain that occurred then was a gradual development as opposed to the sudden onset of the pain back in 1958? A. That's right.

Q. And as you continued to work on December 3, 1958, the pain continually worsened, is that correct? A. The pain continually got worse and worse, yes.

Q. Now, approximately what time of day was it that the pain became so severe that you were unable to do any further work? A. Well, I imagine—it was in the afternoon, it must have been sometime around after 1:00 o'clock, I guess.

Q. And would you describe the nature of the pain at that time? A. Well, it started to paining in my back and just kept getting a little worse and a little worse, and it got to where it was so severe that I just couldn't hardly make it, and the foreman wanted me to move down to another area, so he had a laborer carry my tool box down for me so I wouldn't have to carry that, and I told him then that I didn't think I was going to be able to make it, and he said, it's only a short while before quitting time, just take it easy now.

41 Q. Where was that pain located? A. Right in here (indicating).

THE DEPUTY COMMISSIONER: Let the record show that the witness is pointing to approximately the same area in the left side of his back which the Deputy Commissioner has already described for the record.

All right.

BY MR. INTRATER:

Q. Now, what was your condition with regard to pain the next day? That would be December 4, 1958. A. The pain was very severe.

Q. Were you able to return to work that day? A. No.

Q. Now, for how long a period of time did the pain continue very severe? A. Well, the pain was very severe for a number of months, and I continued to have the pain.

Q. During that period of time did you receive any medical attention? A. Yes.

Q. From whom was that? A. Well, Dr. Tidler—

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43 Q. Now, did there come a time when you were
able to return to work, when the condition of your
back was such that you were able to go back to work
44 after December 3, 1958? A. June 29, 1959.

THE DEPUTY COMMISSIONER: Is it your testimony under
oath, Mr. Dailey, that you did no work from December 3,
1958, until June 29, 1959?

THE WITNESS: That is true.

THE DEPUTY COMMISSIONER: Proceed.

BY MR. INTRATER:

Q. Now, was the reason for your not working from De-
cember 3, '58, until June 29, '59, the condition of your
back? A. Yes.

Q. When you went back to work, for whom did you re-
turn to work? A. James J. Conroy.

Q. And in what capacity? A. Foreman.

Q. And how long did you remain with Conroy as a fore-
man? A. From June 29th—

MR. MAZZUCHI: Of '61 or—

MR. INTRATER: '59.

THE WITNESS: That was '59. June 29th—let's see—to
sometime in the spring of '60.

BY MR. INTRATER:

Q. Throughout that time you were working as fore-
man? A. That's right.

45 Q. Now, did you then cease in the spring of '60,
did you cease working for Conroy completely, or did
you just cease your job as foreman? A. The job was
finished that I was foreman on.

Q. Then where and when did you go to work after that?
A. Let's see now, that was in '60, so I went to work for
the Rubino and Farris Company.

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Q. How soon after you terminated working for the Conroy Company in the spring of 1960 did you start working for the Rubino and Farris Company? A. How soon?

Q. Yes. A. After Conroy Company?

Q. Yes. A. Very shortly. Very shortly. I couldn't say whether it was a day or a couple of days.

46 Q. Would you say it was less or more than a week?

A. I would say less than a week.

Q. In what capacity did you work for Rubino and Farris?
A. I worked a few days as a lather, and they wanted me to take the foreman's job.

Q. Now, how long did you continue to work for Rubino and Farris? A. I am still employed there.

Q. Have you worked for them continuously since that time? A. Continuously, other than three weeks. I finished the Lumberman's Association Building here three weeks ago last Thursday. I was off three weeks.

THE DEPUTY COMMISSIONER: Are you working now?

THE WITNESS: Am I working now?

THE DEPUTY COMMISSIONER: Yes, sir.

THE WITNESS: Yes. Yes.

THE DEPUTY COMMISSIONER: In other words—

THE WITNESS: (Interposing) I will be working now.

THE DEPUTY COMMISSIONER: In other words, you haven't worked for the last three weeks, is that it?

THE WITNESS: Yes I have, I went to work Monday. I went to a job in Virginia to be foreman on, the River House.

BY THE DEPUTY COMMISSIONER:

47 Q. August 28, 1961, you went back to work for the Rubino Company. That is Monday of this week? A. Yes.

Q. And for three weeks prior you didn't work for them?
A. I did not work for them, no.

Q. Now, Mr. Dailey, from sometime in the spring of 1960 you went to work for another employer, is that it, after you left the Mitchell Company? A. From what time was that?

Q. The spring of 1960? A. Yes.

Q. In other words, you worked for— A. (Interposing) James J. Conroy.

Q. James J. Conroy, after June, '59, until sometime in the spring of 1960, is that it? I believe that is what you answered. A. Yes, sir; yes, sir.

Q. Then a few days after you went to work for this present Company, the Rubino Company? A. Yes.

Q. Up until about three weeks prior to August 28, 1961, you worked for them continuously, is that it? A. Yes.

Q. Now, Mr. Dailey, from sometime in December of 1958 until the present time, did you get any treatment
48 from any doctor for your back? A. From sometime in what time?

Q. December, 1958, when you were working for the Mitchell Company, until today, did you get treatment for your back? A. Sure.

Q. From whom? A. Dr. Tidler.

Q. Did he give you treatments? A. Yes.

Q. How many treatments did he give you? A. From— well, from December 3, 1958, until June 29th.

Q. 1959? A. 1959, that is correct. I was going to the doctor sometimes three times a week.

Q. Dr. Tidler? A. Yes, sir, or twice a week, and I went to Dr. Neviasser.

Q. For treatment, or examination? A. Examination, not treatment.

Q. But your testimony is that you went to Dr. Tidler from sometime in December of '58 until June 29, 1959, sometimes two and three times a week for treatment of your back? A. Yes, sir; yes, sir.

Q. How many times do you think you saw him during that period, do you know? A. How many times?

49 Q. Yes, sir. A. I couldn't say a number of times.

Q. Now after June 29, '59, Mr. Dailey, when you went to work for Conroy, you worked for Conroy until sometime in the spring of 1960, is that right? A. Yes.

Q. How many times were you treated by a doctor for

your back? A. I couldn't say exactly how many times, but a few times.

Q. Was it the same doctor, Dr. Tidler? A. Yes, sir, I did go back to him.

Q. Have you received any treatment for your back since the spring of 1960 until today? A. The spring of 1960?

Q. That is when you quit Conroy and later on, a week or so, you went to work for Rubino. A. No.

Q. You haven't received any treatment for your back? A. I couldn't say yes or no, but I don't think so.

Q. Does your back hurt you all the time? A. At times when I am bending, and the more I bend, the more severe it is, and if I sit in a chair for quite awhile, and when I get up, I have trouble straightening up and the pain is very severe right in that area. But at times when I am standing up and not bending too much, I am not doing too bad.

50 Q. Well, from sometime in the spring of 1960 when you quit Rubino until the present time, did you have that kind of pain? A. If I take and do a lot of bending, yes.

Q. Have you had that kind of pain? A. Yes, sir.

Q. Have you continued your job? A. Yes, sir.

Q. Have you lost any time during that period from sometime in the spring of 1960 until the present date from—have you lost any time because of your back? A. I have not.

Q. And it is your testimony, I believe, that you don't remember whether or not you went to a doctor during that time— A. I would say—

Q. (Continuing)—for treatment of your back. A. I would say that I have been to Dr. Weaver I think once or twice.

Q. For treatment? A. Yes, sir.

Q. Mr. Dailey, if your back was paining you so severely, why didn't you go to a doctor? A. I have been to a doctor; I went for seven months.

Q. I mean after the spring of 1960 until the present time? A. Well, if I am standing up and not doing too much bending, I don't do too bad, but bend-

ing, when I go to bend—I had a foreman's job, which is a help to me because I am not doing any bending. The day I start to work with those tools, that is the day I wouldn't be able to make it if I do too much bending.

Q. After June 29, 1959, when you re-entered on duty with the Conroy Company, until sometime in the spring of 1960, and then after sometime in the spring of 1960 until a week or so later, you went to work for Rubino where you are now employed, with the exception of three weeks prior to August 28, 1961. Mr. Dailey, can you tell me if you worked every week? A. Did I work every week?

Q. Since June 29, '59, until the present, with the exception of three weeks prior to August 28, '61, and maybe a few days in the spring of '61, did you work all the time? A. Yes, I was foreman with him.

Q. What was your average weekly wage? A. Well, we just recently had a raise—

Q. Just approximately. A. Well, say \$170.00.

Q. Now the work that you did after June 29, '59, until the present time, did that vary materially from the work you were doing at the time of the injury of March 28, '58, and while you were working for Mitchell on December 3, 1958? Did it vary much? A. I would say, yes, quite a bit.

Q. Was it heavier or lighter? A. I would say much lighter.

Q. Why did you get lighter work, because of your skill as a foreman? A. Yes.

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53 (A short recess was taken.)

THE DEPUTY COMMISSIONER: Proceed, Mr. Intrater.

BY MR. INTRATER:

Q. Mr. Dailey, is it your contention that ever since March 28, 1958, aside from the periods of acute pain that you suffered, say, immediately and then the period of acute

pain from December 3, '58, until June 28th of 1959, aside from those periods of acute pain, is it your contention that throughout this entire period of time from March 28, 1958, until the present, whenever you do any bending or put any kind of strain on your lower back, that you begin to get this pain in your back where you have indicated——

MR. MAZZUCHI: Just a moment.

THE DEPUTY COMMISSIONER: Let him finish.

BY MR. INTRATER:

Q. (Continuing)—where you get this pain.

I will quit there.

Is that your contention?

MR. MAZZUCHI: Just a moment.

I would object to that question. It's very leading. We ought to let the Claimant state his contentions.

THE DEPUTY COMMISSIONER: Overruled. You may answer.

A. I say yes.

54 THE DEPUTY COMMISSIONER: Proceed.

BY MR. INTRATER:

Q. And what effect on this pain—what effect if any is had on this pain upon increased and continual bending and strain? A. It gets worse.

Q. And would say that this condition is true at the present time? A. Yes.

Q. Now, did you at any time prior to the accident of 1958 have——

THE DEPUTY COMMISSIONER: Which one?

BY MR. INTRATER:

Q. (Continuing)—prior to the accident of March 28, 1958, did you at any time prior to that time have any pain of this or a similar nature in this part of your back? A. No, I did not.

Q. That is so far as your memory goes back? A. That's right.

Q. Now you stated that you—I believe that you were not seeking medical treatment during the time that you were working as a foreman because of the lack of strenuous work, is that correct? A. That's right.

Q. Now, during the time that you were getting
55 treatment, would you describe the nature of the treatment that you were receiving? A. Well, it was a heat treatment across the back in that section.

Q. How was this heat applied? A. Well, I think it's a diathermy machine.

Q. And was this the nature of all the treatments that you were getting? A. Yes.

Q. Was that the kind of treatment you were getting from Dr. Tidler at the time you went to him? A. Yes.

Q. And what effect did this heat have on the pain in your back? A. It seemed to ease it, it seemed to ease the pain somewhat when I was taking the treatments.

Q. Now, how about in between treatments, what would happen with the pain? A. In between treatments the pain would be pretty severe at times.

Q. What I am getting at, this easing of the pain, was that in the nature of a temporary easing of the pain just while the heat was going on? A. Yes.

Q. How long would these individual treatments
56 last? A. I would say somewhere around 15, 20, 25 minutes.

Q. Now, how long after the individual treatment was over, for how long a period of time would there remain with you an easing off of the pain? In other words, how long would the effects of the treatments last? A. Well, sometimes it would last—it depends. Sometimes it would take and last for maybe a few hours, and then again I could take and only come from the doctor's office and sit down in a chair and be sitting there, and I would go to get up and I would still have trouble straightening up and the pain would be pretty severe.

Q. Do you give yourself any type of treatment at home?
A. Yes, I do.

Q. What is the nature of that? A. A heat pad; hot baths.

Q. Did any doctor prescribe this for you? A. Yes.

Q. Do you recall who that was? A. Well, Dr. Tidler told me that lots of times it would ease it, and also Dr. Weaver.

Q. And that heating pad, was that just bought in a drug store, or did you get a prescription for it? A. No, in the drug store, and use a damp towel with it.

Q. Did anybody describe to you how to use the
57 heating pad? A. Yes.

Q. Who was that? A. Dr. Weaver and Dr. Tidler.

Q. What effect does this—strike that.

You say also hot baths? A. Yes.

Q. How often do you take hot baths? A. How often?

Q. Yes. A. Well, it depends on how much I bend or how severe the pain is. If the pain takes and gets pretty severe, I get in a tub of hot water and lay in there, and I run it and reheat it.

Q. What about these heating—this heating pad, how often do you use that? A. Well, the heating pad and all, I would say I use the heating pad three or four times a week, maybe five times a week.

Q. Is that at the present time also? A. Yes.

Q. Has that been—even during this time that you have been working as a foreman, have you been using the heating pad? A. Yes.

58 Q. Do you recall when you purchased this heating pad? A. We had one for years.

Q. So that you are not claiming the expense of this particular heating pad? A. No. No, everybody has a heating pad.

MR. INTRATER: I have nothing further.

EXAMINATION BY THE DEPUTY COMMISSIONER

BY THE DEPUTY COMMISSIONER:

Q. Mr. Dailey, you suffered an injury on March 28, 1958, and you were off work from March 28, 1958, until April 21, 1958. A. Yes, sir.

Q. You went back to work and you worked for the same company, didn't you? A. Yes.

Q. Then you worked for some other company? A. Yes.

Q. Is that right? A. Yes.

Q. Conroy.

Then you worked for the Mitchell Company, is that right? A. Yes.

Q. Then you were off work from December, 1958, until sometime in June of 1959, is that right? June 29, 1959?

A. Yes.

59 Q. Mr. Dailey, from June, 1959, until today, with the exception of the period that you were off prior to August 28, 1961, you have worked most of the time, haven't you? A. I have.

Q. Practically more than two years, haven't you? A. I worked most of the time, yes, sir.

Q. Approximately more than two years, is that right? A. I would say yes.

Q. And you have earned an average of \$170.00 a week or \$172.00, is that right? A. Well, I was making approximately \$172.00 when I was with Conroy, and with the other shops I am not.

Q. That was after June, 1959? A. Yes.

Q. What was your salary for the time prior to the three weeks that you were off up until August 28, 1961? How much did you earn from the Rubino Company? A. Let's see, our scale is \$4.00—

Q. I am interested in only what you earn a week, I am not interested in any union scale. There is nothing in the law saying anything about a union scale. I want you to tell me how much you earned. A. \$170.00.

Q. \$170.00 a week? A. \$170.00.

60 Q. During all that time can you tell me how often you found it necessary to take off from work because of the severity of the pain in your back? Can you approximate— A. (Interposing) Mr. Einbinder, if I taken off from work with a family my size, we wouldn't eat. I am

buying my place, and if every little pain I had I taken off from work, we wouldn't make it.

Q. Well, Mr. Dailey, your claim here before the Deputy Commissioner is for a period of temporary total disability and a period of some permanent partial disability beginning June 30, 1959, to the present date.

The Deputy Commissioner is interested in receiving all facts pertaining to that claim. Now I want to know how often you found it necessary to take time off from work because of the pain in your back since June 29, 1959, to the present date. Can you guess how many days or weeks you took off? A. Well, I wouldn't say that I was off no whole lot. When I finished the job with Conroy I did take a few weeks off and all when I finished the motel on New York Avenue and before I went to work for Mitchell.

Q. Was that because the job terminated? A. It had terminated, and when it did, I took a few weeks off and all. I figured that a little rest wouldn't hurt me any, and then I went to work for Mitchell Company.

Q. But it is your testimony that the reason you
61 didn't work in between jobs was because there was no work available, is that right? A. I would say there wasn't work available.

Q. Was it because— A. (Interposing) The job had finished and I taken off a couple weeks before I went on the other job.

Q. But the fact that you had a job which terminated had nothing to do with your back complaint, is that it? A. No, sir, that is right.

Q. In other words, had the job proceeded, you would have continued to work, is that correct? A. I would, as foreman.

Q. Since you went to work for Rubino—was it in 1960, sometime in the spring of 1960 up until the present? A. Let's see. I would say it was in June or something like that, '60, I think.

Q. Mr. Dailey, do you have a feeling, do you have a genuine thought or conviction, which is a feeling, that in view of what you have told me here this morning, that you have a permanent disability? A. Yes, I do feel that.

Q. That is your honest conviction? A. Yes.

Q. And it is your testimony that since June 29, 1959, you have worked almost constantly, is that it? A.

62 As foreman.

CROSS-EXAMINATION

64 BY THE DEPUTY COMMISSIONER:

Q. Mr. Dailey, when you quit this work at the Mitchell Company on December 3, 1958, until June 29, 1959, did you at any time tell the Mitchell Company or its foreman that you sustained an injury or that you were unable to work because of your employment at that establishment? A. I had told the foreman, yes.

Q. You had told the foreman? A. Sure.

Q. When did you tell him? A. The day it happened.

Q. December 3, 1958?

66 Q. What was the name of the man who was the foreman on the Mitchell job? A. William Haack.

Q. On December 3, 1958, who was the foreman? A. William Haack.

Q. Was this the man that you talked to about being hurt, about hurting your back on that job on December 3rd? A. That is the man that I talked to, and I told him that the pain got so severe that I couldn't make it.

69 Q. Now, when you went back on the Novinger job in April of 1959, you went back to doing your tool work, didn't you? A. Yes.

Q. Did you carry your tool box at that time? A. Did I carry my tool box?

Q. Yes. A. Not too much. I taken it to the area where we were working, the locker room—

Q. But you carried it the same as you did any other time? A. Yes.

Q. To the area shop, and to the area where you were working? All the lathers do that, don't they? A. Yes, they carry it there and leave it set there and get the tools out of the box.

Q. The tool box generally carries the same weight of materials all the time, doesn't it? A. Approximately, yes.

Q. About 35 pounds—

70 THE DEPUTY COMMISSIONER: Let the record show that Mr. Mazzuchi, I believe, referred to April '59 when he returned to Novinger as April '58. He returned April 21, 1958.

BY MR. MAZZUCHI:

Q. As a matter of fact, you carried your tool box with you on every job that you went to? A. You do carry it.

Q. And deposit it in the area? A. Yes.

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Q. Did you ever use the heat pad prior to March of '58 for yourself? A. No.

Q. Never used it for any condition at all? A. No.

Q. Never hurt your back in any manner prior to 71 March 28. A. Did I ever hurt my back?

Q. Yes. A. No, I never hurt my back.

Q. You are sure of that? A. For the injury to my back, no.

Q. Mr. Dailey, were you not under the care and treatment of Dr. John Allan Talbot in 1951? A. I think I did go to Dr. Talbot, yes.

Q. What was that for? A. Sacroiliac.

Q. Where is that sacroilica located? A. I think it's in the lower part of your back.

Q. Did you forget that time when I asked if you had ever hurt your back before? A. No, I went to him for treatment and to be strapped, my sacro-iliac.

Q. How did you hurt your back that time? A. How?

Q. Yes. A. Well, I think it was in the National Education Association, which—I guess that is located right over here, isn't it? Let's see, this is "M" Street—

THE DEPUTY COMMISSIONER: Proceed.

A. (Continuing) And I was walking up a stairway there and stepped up on a scaffold.

72 Q. And your back hurt? A. Yes, and my right leg.

Q. Did you at that time fall or in any way twist yourself? A. No, I didn't fall.

Q. Just as you were walking along and stepping up on the scaffold, your sacro-iliac popped out? A. I stepped up on the scaffold, yes.

Q. When was the time prior to that that your back hurt? A. I don't remember any time. I don't remember any time.

Q. You don't remember any time other than that? A. No.

Q. Were you in the Service, sir? A. No.

Q. Were you rejected for the Service? A. Yes.

Q. Why? A. I never did get the reason.

Q. Did you ever have any extremely nervous manifestations prior to the time that they examined you for the Service? A. Nervous?

73 Q. Yes. A. No, not as I know of.

Q. Isn't it a fact that you were exempted from Military Service because of nerves? A. It could have been.

Q. Well, is it or isn't it? A. I couldn't say. I never got the answer.

Q. What was your classification? A. For physical examination?

Q. Yes. A. It was 1-A.

Q. Why didn't you get into the Service then? A. I couldn't say.

Q. Didn't you tell one of the doctors who examined you that you were exempted from Military Service on account of nerves? A. I don't remember.

Q. Were you in fact exempted on account of nerves or on account of a nervous condition? A. I couldn't say. I'll tell you what, the paper that I did read, that one of the gentlemen had marked on there, had on it that due to this man's occupation, he is essential in his work.

Q. You say a doctor said that? A. I don't know whether it was a doctor or not, but one of my papers said that.

74 Q. Have you had any other episodes with your back, any part of your back? A. No, not as I know of.

Q. The only three that you know of to remember now are the ones that happened in 1951 when you were treated by Dr. Talbot, and the ones that happened in March of 1958 and December of 1958? A. I don't know whether it was '51 or not. It could have been, if you say it's '51.

Q. In the early 50's. A. I couldn't say whether it was '50 or '51 or what.

Q. Do you know how much time you lost from work as a result of that injury? A. I think a very few days.

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75 (A short recess was taken.)

THE DEPUTY COMMISSIONER: Let's proceed.

Thereupon,

Dr. Harold S. Tidler

was called as a witness for and on behalf of Respondents Novinger Company, Inc., and United States Fidelity and Guaranty Company and, having been first duly sworn by The Deputy Commissioner, was examined and testified as follows:

THE DEPUTY COMMISSIONER: Please give the reporter your full name and address.

THE WITNESS: Dr. Harold S. Tidler, 4892 Fenton Street, Silver Spring, Maryland.

THE DEPUTY COMMISSIONER: Let the record show that Dr. Tidler is appearing as a witness for the employer and carrier in Case No. 25033-10.

All right, Mr. Mazzuchi, will you please qualify the Doctor?

DIRECT EXAMINATION

BY MR. MAZZUCHI:

Q. Doctor, are you licensed to practice medicine in the District of Columbia? A. Yes.

Q. And when did you become licensed? A. I think in 1956.

Q. Doctor, where did you take your degree? A. 76 I went to medical school at George Washington University School of Medicine, and graduated in 1949.

Q. Where did you take your internship? A. At the United States Naval Hospital, Bethesda, Maryland.

Q. Have you had an special training? A. I have had four years of specialty training in general surgery at the Veterans Hospital, Fort Howard, Maryland.

Q. Have you been engaged in any specialty since you have been engaged in practice in the District of Columbia? A. Yes, I am a specialist in general surgery.

THE DEPUTY COMMISSIONER: Any questions on the Doctor's qualifications, Mr. Intrater?

MR. INTRATER: No.

THE DEPUTY COMMISSIONER: Mr. Cooney?

MR. COONEY: (No, shaking head.)

THE DEPUTY COMMISSIONER: Let the record show that Mr. Cooney said no.

BY MR. MAZZUCHI:

Q. During the course of your practice, Doctor, did you have occasion to examine and/or treat the Claimant in this case, Wilburt E. Dailey? A. Yes, I have examined and treated Mr. Dailey.

Q. When did you first see him, sir? A. The first
77 time I saw him was December 5, 1958.

Q. Did you take a history from him? A. Yes, I
did.

Q. What was that history? A. Mr. Dailey stated as
follows: I was working at the Senate Office Building on a
scaffolding about 18 inches off the floor, indoors, when a
board flipped with me and I fell down to my hands and
knees. I got up and went to pull out a channel iron and
felt pain in my back.

I went back to work on April 20, 1958. Two days ago—
that would be December 3, 1958—the pain became so severe
at work while walking around. I finished the day's work
and came home—

MR. COONEY: I beg your pardon, Doctor. Will you start
that sentence again?

Are you reading from your report of December 13, 1958?

THE WITNESS: No, I was reading from a card, but I think
this is essentially the same as in my report.

MR. COONEY: I see. I was following and then I got mixed
up, I am sorry.

THE WITNESS: I will re-read the sentence.

Two days ago—that would be December 3, 1958—the pain
became severe at work while walking around. I finished
the day's work and came home. The pain was in my
78 lower back, more on the left side.

I have a more complete history if you are inter-
ested in some of these reports.

THE DEPUTY COMMISSIONER: Does it amplify what you
have already told us?

THE WITNESS: I believe it does, yes.

THE DEPUTY COMMISSIONER: Go ahead, read the more
complete report. Proceed.

THE WITNESS: All right.

The patient states that on March 28, 1958, he was work-
ing as a metal lather on the Senate Office Building job in
Washington, D. C. He was—

MR. INTRATER: Just a moment, Doctor.

For the record can we state that you are now reading verbatim from your report dated December 13, 1958?

THE WITNESS: Yes, that is right.

THE DEPUTY COMMISSIONER: Proceed.

THE WITNESS: He was indoors on a scaffolding about 18 inches off the floor when a loose board flipped as he stepped on it and he fell to the floor landing on his hands and knees. He got up and started to pull out a channel iron and felt pain in his back. The pain became severe and he did not return to work until April 20, 1958. He had been treated by Dr. Weaver in Laurel, Maryland, and X-rays of his spine were made at Prince Georges General Hospital soon after the injury. Since April 20th he has continued to work but has noticed pain in the lower part of his back intermittently for which he has used a heating pad at home.

He states that on December 3, 1958, he was walking across a room on the job when he began to feel severe pain in the lower lumbar region of his back. There was no injury or strain associated with onset. He finished the day's work in considerable pain, came home and went to bed. He has been out of bed only to go to the bathroom and notices aggravation of the pain on standing. The pain radiates along both paravertebral areas to the neck but does not radiate to the hips or lower extremities. It is relieved by bedrest and head and is aggravated by standing or coughing. The pain is noted chiefly in the left lower lumbar region.

The patient also states that he has had no injuries to his back or symptoms associated with his back prior to the injury on March 28, 1958. He has had no changes in appetite, weight, nor urinary or gastrointestinal symptoms.

BY MR. MAZZUCHI:

Q. Now, Doctor, did you question him carefully about past injuries to his back? A. I am sure I asked him about past injuries to his back.

Q. And he denied any past injuries? A. Yes, sir.

80 Q. Now, did it subsequently come to your attention that he had had past injuries to his back? A. Yes, I received a copy of a report that Dr. Shapiro had submitted where there was information that he had had previous back trouble.

Q. Did you then subsequently question him about other injuries to his back? A. I don't recall.

Q. All right.

Did you make an examination, Doctor? A. Yes.

Q. And what was your examination? A. With reference to his back, the thoracolumbar area is symmetrical with good muscular development and slight spasm in the left lumbar paravertebral muscles. Interlaminar tenderness is present at L5 on the left. No tenderness is elicited on percussion over the thoracolumbar spine. Straight leg raising test is normal on the right, limited at 70 degrees by pain on the left. The patellar and achilles reflexes are normal. Strength of motions at the ankle and knee joints is normal and equal bilaterally. There was no sensory loss.

My impression was, No. 1, congenital anomaly, moderately severe, with deformity, affecting the lumbar spine area of third and fourth lumbar vertebrae.

And No. 2, sprain, old, moderately severe, affecting the lumbar spine.

81 Q. Did you review any X-ray plates, Doctor? A. Yes, I have seen the X-rays that were made at Prince Georges General Hospital on April 5, 1958. They are reported by the radiologist as follows: Examination of the lumbosacral spine discloses marked straightening of the lumbar curve. There is definite and marked narrowing of the disc at the level of 3-4 L, which strongly resembles an incomplete fusion; namely, a so-termed congenital block vertebra. There is no evidence of spondylolisthesis. There is slight wedging effect of T-12, which may be due to positional strain or possible an old osteochondritis. There is scoliosis of the lumbar spine, with convexity directed to

the left. In addition, there is fusion of the third and fourth lumbar spinous processes which is rather conclusion that this is a block and congenital deformity at this level.

Q Now, Doctor, as a result of your study of the X-rays, the history taken, including the subsequent history which you received of previous back difficulty, and your diagnosis, did you form an opinion as to the condition of this Claimant? A. Yes.

Q. What was that? A. I feel that Mr. Dailey has had three episodes of back trouble from the information
82 that is available to me. He definitely has a very severe congenital anomaly of his back, and I feel that he is subject to episodes of back pain at any time. I feel that the injury he had in March of 1958 was a sprain superimposed on a congenital anomaly of his back. He was treated for it. He went back to work I believe in April of 1958, and was apparently in relatively good condition at that time, and worked until December of 1958 when he had a recurrence of back pain, which was this third episode, while he was walking across a floor at work.

I think he has had three episodes of trouble that are based primarily on the congenital anomaly of his back, and I think he is a type of individual who is subject to episodes of back trouble at any time.

Q. Doctor, do you think that he ever reached a status or—do you think he had reached a condition where he had recovered from the acute episode of March 1958? A. Well, I felt that he had a sprain of his back at that time, and I feel he had recovered from his sprain by the time he returned to work.

Q. Did he, Doctor, ever recover from the effects of the second episode, the acute effects of the second episode? A. That is the one in March of '58?

Q. No, sir, excuse me, the third one, the one in December of '58? A. He improved. I don't think that he has
83 ever been completely free of discomfort over a long period of time, so in that respect it's difficult to say

whether he has completely recovered. I think that he is still having intermittent trouble with his back, based on a rather severe congenital anomaly.

Q. You think that his trouble with his back then is due to severe congenital anomaly rather than the episodes of back pain that he has had? A. I think the back pain is the result of a condition in which he has this congenital anomaly, which predisposes him to back trouble. If he is subjected to any slight bit of trauma, he could develop pain at any time.

Q. Were you present in the room when Mr. Dailey testified, Doctor, concerning the first episode of back pain that he had? A. Yes.

Q. You heard him say then that he got this back pain when he stepped up on a scaffold? A. Yes.

Q. Doctor, are any of these three episodes of which Mr. Dailey has spoken which led to the back pain, could any of these episodes, or any of these incidents, be considered severe back trauma, or even moderately severe trauma to the area of the back? A. I think they would be considered mild to moderate trauma, and primarily the first and second episodes. There was no history of trauma in the third episode.

Q. He has testified here this morning, Doctor, that actually this pain in his back on December 3rd started in the morning and got progressively worse until the time when he was walking and it struck him so that he didn't think he could finish the day; that he worked—did his usual work that day, which included working with some snippers weighing approximately two pounds, and a lathing axe weighing approximately a pound and a half; that he did some stooping and some reaching that day in doing his regular lathing work; that as he worked during the day his back got progressively worse.

Now, would these activities as such be considered trauma sufficient to cause acute exacerbation of his congenital anomaly? A. No, I wouldn't consider any one of them as trauma sufficient to produce back pain.

Q. Now, would you consider them in concert as sufficient to produce back pain? A. Excuse me one moment. I don't recall if you included falling off the scaffolding—

MR. INTRATER: He is talking about December 3rd.

MR. MAZZUCHI: I am talking about the December 3rd incident, Doctor.

THE WITNESS: I am sorry. No, there was nothing
85 there that would—that I would consider severe enough to produce any back pain.

BY MR. MAZZUCHI:

Q. Now, Doctor, do you have any opinion as to whether any of these episodes have contributed to a permanent condition which this Claimant may have?

First let me say this, Doctor: Do you think the Claimant has a permanent partial disability of any type? A. I would have to refer to my last report on him and see what his condition was at that time.

The last time I saw him was December of 1959, and it has been some time.

Q. You may refer to it.

EXAMINATION BY THE DEPUTY COMMISSIONER

BY THE DEPUTY COMMISSIONER:

Q. Dr. Tidler, the first time you saw Mr. Dailey was December 5, 1958? A. Yes, sir.

Q. Did you treat Mr. Dailey on December 5, 1958? A. Yes.

Q. What did you do for him? A. I think I gave him some diathermy and medication—I am sorry, I think I saw him at home the first time I saw him. I went out to his home and examined him, and I believe I gave him some medication for pain and advised him to come into
86 my office when he was able to.

Q. Did he come in to your office? A. Yes.

Q. When? A. December 8th.

Q. 1958? A. Yes.

Q. What did you do then? A. I started him on treatment for his back trouble in the form of diathermy, medication for pain. I don't remember if I strapped his back or not, but I gave him treatment for his back ache at that time.

Q. Now, on December 8, 1958, you had already obtained a history of injury from Mr. Dailey, is that right? A. Yes, sir.

Q. What was your diagnosis on December 8, 1958? A. Well, I felt that he had a severe sprain affecting the lumbar area of his spine at that time.

Q. Now, after December 8, '58, did you treat him again? A. Yes, I treated him over a period of about one year intermittently.

Q. Intermittently from December 8, 1958, until December 1959? A. Through August of 1959, and then I
87 re-examined him on December 9, 1959.

Q. How many times did you treat him between December 8, '58 and August—when is the last time you treated him, August 1959? A. August 17th.

Q. How many times did you treat him between December 8, 1958, and August 17, 1959? A. I don't know. I could count them.

Q. All right. A. (Witness examining records.) I saw him approximately 80 times in my office.

Q. Between December 8, 1958, and August 17, 1959? A. Yes.

Q. On those 80 visits you gave him what type of treatments? A. Well, it was not for treatment only, it was for observation and treatment. He had various types of physiotherapy; at different times he had X-rays made, further X-ray studies; he had consultation with an orthopedic surgeon and with a neurosurgeon, so it was a combination of observation, treatment and consultation.

Q. Were these consultations made at your request? A. Yes, sir.

Q. And the last time you treated him was on
88 August 17, 1959? A. That's right.

Q. Did your diagnosis change from a sprain of the back from December 8, 1958, during the time you treated him, until you discharged him from treatment August 17, 1959? A. Yes, sir.

The sprain of the back was the initial impression when I saw him at home. When I submitted my first report to USF&G Company, I listed my diagnoses as I gave them when I was reading this report, which was congenital anomaly and so forth affecting the spine, and then this old sprain affecting the lumbar spine.

Q. Did it change any during the time you treated him until you last saw him on August 17, 1959? A. I would say no.

Q. It was the same diagnosis? A. Yes, sir.

Q. And I believe you answered in response to Mr. Mazzuchi's query that you saw some X-rays? A. Yes.

Q. And the X-rays revealed some anomaly which existed between the lumbar 3rd and lumbar 4th vertebrae. A. Yes.

Q. Was that the only revelation made on the X-rays that
89 you saw? A. No, sir, there were a number of things that the X-rays revealed. One thing in addition to the congenital anomaly, between the third and fourth lumbar vertebrae there was also at one time evidence of fracture of the left fourth lumbar transverse processes.

Q. When was that revealed, what X-ray? A. I have a report dated December 16, 1958, from the X-ray Department of the Prince Georges General Hospital.

Q. Yes? That was made at your request? A. Yes, sir.

Q. Proceed. A. Examination of the lumbosacral spint disclosed a so-called incomplete block fusion vertebra at the level of 3-4 L. There was no evidence of fracture. The lumbosacral disc is of normal description. It is now seen that there is a suspicious radiolucence on the left fourth lumbar transverse process. Strongly recommend a spot film of this region to make certain that it is a fracture and

not an artifact. In reviewing the original film this was not seen at that time.

As a result of that I obtained a spot film as the radiologist had suggested, and the report is as follows:

Spot film of left fourth lumbar transverse process discloses a fracture through the tip of the 4th lumbar transverse process with good position of fragments.

I believe he had subsequent X-rays. There is an X-ray report dated March 3, 1959. Lumbar: The fracture
90 of the left transverse process of the L-4 remains in good position with some new bone formation, although the fracture line is still visible.

Q. Is it possible that when they took an X-ray of Mr. Dailey in April of 1958 that they missed this fracture which they discovered in December of '58? A. I believe it's unlikely that they missed it.

Q. Now, Dr. Tidler, you last treated Mr. Dailey on August 17, 1959. A. Yes, sir.

Q. From the time you treated Mr. Dailey on December 8, 1958, until August 17, 1959, what is your opinion as a physician as to whether or not Mr. Dailey was incapacitated from performing his work as a metal lather? A. I know that he was off work for a period of time in that interval.

Q. I want your opinion as his doctor. Did you order him to stay off work? A. Well I feel that certainly for part of that time he was unable to work.

Q. How much of that time? A. That would be difficult for me to say right now without going through my records rather thoroughly, because as I recall, he worked off and on, I believe, during that time, but I don't remember
91 exactly how much. He followed my advice, I feel, pretty well, as to when he was off and when he was working.

Q. Was he—in your opinion as a physician, was he disabled from December 8, 1958, until August 17, 1959? A. Not for the entire time, no, sir. I noted on my records that he resumed work on June 29th. I believe that was 1959.

Q. Well, he testified here this morning, to give you the benefit of the testimony, that he was off work from December 3, 1958, until June 29, 1959. In your opinion as a physician was he wholly disabled during that time? A. No, sir, not wholly disabled.

Q. Was he disabled at all during that time? A. I feel he was partially disabled.

Q. How much partially disabled was he, doctor? A. Well, this varied considerably during the time from one month—from one period of time to another. I don't think I could give a set partial disability that would cover the entire period of time. His condition changed considerably.

Q. For the period from December 3, 1958, until June 29, 1959, looking at your records, keeping in mind the times that he was in your office for treatment and consultation and examination, can you give me an opinion as a physician as to whether or not Mr. Dailey had any physical
92 impairment during that period, and if so, the extent of it in percentage terms.

In other words, did he have any loss of use of his body as a whole from a medical standpoint? I don't want you to be concerned with whether or not he had any loss of wage earning capacity. It is for me to decide whether he had any loss of wage earning capacity.

As a physician, did he have any physical impairment to his body as a whole? A. He had some.

Q. How much? A. I would say approximately 40 per cent.

Q. As a human being? A. Yes.

Q. For that whole period or—from December 8, 1958, until August 17, 1959, or just until June 29, 1959? A. That is a difficult question to answer, because I first saw him when he was lying in bed at home, and he was, I would consider him a hundred per cent disabled the first night I saw him, and he gradually improved over a period of time so that I can't pick out one percentage disability that would cover him from a hundred per cent until maybe he was

down to five or ten per cent, at which time he was able to resume work.

Q. Dr. Tidler, from December 8, 1958, when he
93 came into your office, after you had seen him at home on December 5, 1958, did you ever put this man in a hospital? A. No, sir.

Q. Did you ever prescribe that the man stay in bed at home? A. No, I didn't put him on strick bedrest at home at any time.

Q. During the period from December 8, 1958, until August 17, 1959, were you ever called by Mr. Dailey to his home and find him in his bed at home because of his back? A. No, sir.

Q. Now, Dr. Tidler, you have testified that your diagnosis was sprain of the back and anomaly of the back, and is it your opinion that the fracture of the left transverse process of a particular vertebra which was revealed in an X-ray in December, 1958, and which you have testified was not found on April 5, 1958, in an X-ray made by a radiologist at Prince Georges Hospital, and which you further testified would be unlikely to have been missed, is it your opinion that there is any relationship between this fracture of the left transverse process and the history you obtained from Mr. Dailey when you first saw him on December 5, 1958? A. It's impossible for me to know for sure whether his symptoms were due to the fracture at that time. As a
94 general rule, pain from a fractured process, fractured transverse process, will extend over a period of two or three weeks. After about two or three weeks I would feel reasonably certain that he was not having pain from a fracture of the transverse process.

Q. Well, is it your opinion as a physician that the fracture, if there was a fracture—I am giving you a query based on what you have testified—assuming that your testimony that there was a fracture is accepted by the Deputy Commissioner, is it your opinion that this fracture was the result of the history that you obtained from Mr. Dailey

concerning the manner in which he had an accident on March 28, 1958, and the work that he performed on December 3, 1958? Was it related to either one of those incidents or alleged incidents or conditions of work? A. No sir, I don't believe his fracture was related to either one of those situations.

Q. Dr. Tidler, you have testified that you found Mr. Dailey suffering from an anomaly of his back lying somewhere between the lumbar third and lumbar fourth vertebrae. Was that condition in any way related to the history of any injuries you obtained from him? A. I believe it predisposed him certainly to episodes of back ache. In that way it is certainly related to his three episodes of back trouble that he has had.

Q. Was the anomaly aggravated, precipitated or
95 materially augmented by the incidents I have described that you obtained from Mr. Dailey when you talked with him on December 5, 1958? A. I don't believe the anomaly has been changed in any way by what has happened to him. That anomaly is something he has had since birth, and insofar as I can tell from X-ray examinations or physical examinations, there is no evidence that it has changed any.

Q. In other words, it is your testimony under oath that it has neither aggravated nor precipitated nor grown worse, is that right? A. Yes, sir.

Q. Dr. Tidler, as of August 17, 1959, did you discharge Mr. Dailey from further treatment? A. I didn't actually discharge Mr. Dailey from treatment. I recommended to him that he have a special X-ray examination of his urinary tract done, and I was waiting over a period of time for him to let me know that he was willing to have me make the arrangements for the X-rays, which he never did, and as I recall, I saw him for the last time on August 17th—

Q. 1959? A. Of 1959. He didn't come back until December 9th, when he came in for a final—for an examination—

Q. On August 17, 1959, had he recovered from the effects of the injury of March 28, 1958, or the consequences
96 of his work on December 3, 1958, as related to you on December 5, 1958?

He came to you for treatment of a back condition. Now had he recovered from the effects he had, if he had any? A. His condition was not greatly changed from what it had been over the previous several months.

Q. Had he reached the limit of recovery? A. I believe he had reached a stabilized period which probably represented maximum recovery for him.

Q. As of that time did he have any disability of any kind, either temporary, partial or permanent? That is, in your opinion as a physician? A. Yes, sir, he had some disability at that time, I felt.

Q. Was it temporary, was it partial, was it permanent? A. I feel it was temporary, and partial.

Q. How much in percentage terms? A. I haven't estimated it. I would have to give you an approximation.

Q. You saw this man approximately 80 times. You are qualified in my opinion to give an approximation. A. Yes, sir.

Q. What is your approximation? A. I would say that in all probability he had a 20 per cent—

97 Q. Temporary partial? A. (Continuing)—temporary partial disability at that time.

Q. When you saw him in December, 1959, what did you find? Did you see him again in December, 1959? A. That is what I was speaking of, my examination in December, 1959.

Q. Proceed. Is that what you found, a 20 per cent temporary partial disability? A. I would estimate it at that.

Q. I was referring to your last examination and treatment on August 17, 1959. A. There wasn't any observable change in his condition.

Q. From August 17, 1959, until the last time you saw him in December, 1959? A. Yes, sir.

Q. When did you last see him in December of 1959? A. It was December 9.

Q. December 9, 1959? A. Yes.

Q. And it is your opinion that on December 9, 1959, his condition was as static as it was when you last saw him and treated him on August 17, 1959, and at that time, it is your opinion as a physician, that he had a 20 per cent temporary partial disability, is that correct? A.

98 Yes, sir.

Q. Is it your opinion that that 20 per cent temporary partial disability is attributable to the history that you received from him of either the injury or the consequences of his work? Was it in any way related to what he told you had happened to him?

In other words, he came to you and he told you that on March 28, 1958, he had an accident, and when he came to you on December 5th, he came to you and told you that on December 3, 1958, he had no trauma and no injury, no untoward incident; he was walking down the hall and he got a pain in his back.

Now, is this related to either one of those histories? A. I don't believe it is.

THE DEPUTY COMMISSIONER: I have no further questions of the Doctor.

Mr. Mazzuchi?

DIRECT EXAMINATION (Resumed)

By MR. MAZZUCHI:

Q. So that we understand clearly, Doctor, do I understand that this 20 per cent temporary partial disability is related primarily to this congenital anomaly? A. Yes.

MR. MAZZUCHI: I see.

I have no further questions.

Excuse me, I do have one or two further questions.
 99 THE DEPUTY COMMISSIONER: All right, proceed.

BY MR. MAZZUCHI:

Q. Doctor, why did you suggest a pyelogram for Mr. Dailey? A. I suggested a pyelogram because he has had a long period of left lumbar back ache, and he has X-ray evidence of a congenital anomaly of his spine, and it's well-known that in a situation such as this there is high incidence of congenital anomaly affecting the urinary tract in connection with congenital anomalies of the spine. I think it would be necessary to have that examination to know whether there is any coexistent anomaly of his urinary tract.

Q. Did you explain this to Mr. Dailey? A. Yes.

Q. And he refused to have that examination, is that correct? A. Well, as I recall, he always told me he was going to have it, but he never would make definite arrangements.

Q. Do you feel that this then might explain some of the reasons for his intermittent pain? A. It's very possible that it could.

Q. Would this have anything to do with the incidents of his employment? A. No.

Q. There would—this would be solely related then
 100 to the effects, the after effects of the congenital anomaly? A. That's right.

MR. MAZZUCHI: I have no further questions.

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 CROSS-EXAMINATION

BY MR. INTRATER:

Q. The sprain that you are talking about is the
 101 sprain of March 28, 1958, is that correct? A. Yes, sir.

Q. Now you say that as of December, 1959, you give him a 20 per cent temporary—you would say approximately 20 per cent temporary partial disability, in no way related to

the injury, but only to the congenital anomaly, is that correct? A. Yes.

Q. When do you expect this to clear up? A. I don't know. I don't know whether this will clear up or not.

Q. Well then, in fact this is not a temporary partial disability, this is a permanent partial disability, isn't that correct? A. I don't know at this time whether it's permanent or not.

Q. Well then, you would have to revise your statement that this is temporary, wouldn't you? You would have to say that—you therefore have to say that he had 20 per cent partial disability, and as to whether this is temporary or permanent you cannot state, isn't that correct, Doctor? A. At the time when I last saw him I thought it was temporary.

Q. Well now— A. But I haven't examined him since December, 1959.

Q. Now you were here during part of his testimony. You heard his testimony that he continues to suffer whenever he starts to bend over, does any bending or straining. On the basis of that would you say that this has cleared up?

THE DEPUTY COMMISSIONER: The Doctor has testified that he hasn't examined Mr. Dailey since 1959.

BY MR. INTRATER:

Q. On the basis of his testimony that you heard, he says at the present time he has this pain whenever he has any strain on the back or does any bending. On the basis of that would you say that this has cleared up? A. Well, it would certainly indicate that his trouble is continuing, according to his statement.

Q. What I don't understand, if this is congenital, that is, something that is in his back and it is congenital, what can happen to cure this?

Is some internal—is there going to be some change internally that is going to dissipate this disability? A. Not necessarily. In a congenital, a severe congenital anomaly

such as he has, he would wake up in the morning after lying in a twisted position and have exactly the same symptoms as he had on each of these three episodes. This thing can come on at any time.

Q. The chances of Mr. Dailey having a permanent disability are lots greater than the chances of his having a temporary disability, isn't that so? A. It's possible
103 he could have a permanent disability, but these things fluctuate so much. He may have a remission lasting over a period of years when he may be completely free of pain. I don't see how anybody can predict. He might recover completely.

Q. Then you don't want to predict whether it's temporary or permanent, is that correct? A. I can't predict at this time.

Q. Now this man testified he had a fall from a scaffold on March 28, 1958, and very shortly thereafter while lifting or pulling on a channel iron he felt pain in his back. Did he further tell you that since that time, when you saw him on December 5th, that he had no fall or no injury or no accident? A. He gave me no history of subsequent injury.

Q. Now, to what do you attribute this fracture of the fourth lumbar transverse process? A. I have nothing I can attribute it to.

Q. Now you have said that his fall did not cause it. In view of the fact that the fall was the only trauma in his history, the only one, and you have nothing else to attribute it to, why do you discount the fall and say it was not the fall, but you don't know what caused it? A. You are accepting his statement that he has had no—

104 Q. That is correct. A. (Continuing) —no further injury in the meantime.

Q. That is absolutely correct, I am presuming he is telling the truth. Are you presuming he was lying to you? A. No, I think it's very possible that a man can have an injury that he may not regard as something that would be likely to cause a fracture of the transverse process.

Q. I am asking you now, Doctor, on the basis of the history that he gave you, on what do you base your diagnosis that the fall and the pulling and straining that he had at that time, with the onset of pain at that time, that that did not cause this fracture, yet you do not know of anything else to which you could attribute it. A. Well, first of all, as I recall he didn't have pain immediately following his fall of about 12 to 24 inches off the scaffolding down to the floor. As I recall from what he told me, he got up and went someplace and started to pull on a channel iron, to pull out a channel iron, before he had any pain in his back, so I can't believe that he sustained a fracture of his transverse process at the time of the fall and didn't have pain until he went over and pulled something out of a rack. And I certainly don't think——

Q. Did he tell you he was attempting to lift something heavy immediately subsequent to the fall? A. He didn't give me that history. He gave—he said that he was pulling a channel iron out of a rack, not that he was lifting
105 particularly.

Q. Well, assuming that he was—that he has some straining and was pulling along with other people a channel iron, pulling on a channel iron, and this was only 150 away from the place where he had his fall, and he had proceeded from the place of the fall to the channel iron and immediately started doing this and immediately felt the pain, would you then change your opinion as to whether this accident, the combined incidents of the fall and the strain of pulling on this channel iron, would that affect your opinion as to whether that had anything to do with——

MR. MAZZUCHI: Excuse me, Doctor.

MR. INTRATER: I prefer that you wait until I finish the question.

By MR. INTRATER:

Q. Assuming now that in fact this was a heavy channel iron, that it was approximately 150 feet away from the scaffolding where he had his fall, and he had proceeded from

that scene to the other scene and was straining and pulling along with other people on this heavy thing. Assume those things to be true. Would that have an effect on your diagnosis concerning the causality between those incidents, that is, this fracture of the 4th transverse process as well as the history that he suffered no—between that time and the time you saw him he suffered no blow, injury or accident to his back.

106 THE DEPUTY COMMISSIONER: And keeping in mind that the Doctor has testified that the initial X-ray taken at the Prince Georges Hospital on April 5, 1958, revealed no fracture. I think that should be included as part of the question.

MR. MAZZUCHI: I am going to object to that because I don't think that the information given the Doctor is complete in the hypothetical question. I believe Mr. Intrater poses this as a hypotheses. And I think also the Doctor should have information concerning the first episode which this man sustained, in answering the hypotheses.

THE DEPUTY COMMISSIONER: Overruled.
Proceed.

A. I don't believe that Mr. Dailey sustained a fracture of the transverse process of his vertebra at the time of his fall because if he had, I would have expected him to have had immediate pain. It would be highly unusual for him to fall off a scaffolding and get a fracture of this transverse process and not have pain at that time.

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109 Q. Now, Doctor, you have referred to this as the basis of your testimony today; you have referred to three separate incidents. An early incident concerning which you had received a report from Dr. Shapiro, an incident in March of 1958, and an incident of December of 1958. You have tied this all in, I believe, in your testimony with respect to this congenital anomaly. I am asking you therefore, since you did that, you tied it in, not I, whether it is your opinion that that so-called jumping out of the sacro-

iliac, occurring in early 1950, for which he received very brief treatment and was off only for three days, and has had no further trouble from it, whether you attribute that to this congenital anomaly? A. Well, first of all I would have to presume that he had back trouble at that time; the type I don't know. But I believe I testified that his congenital anomaly certainly predisposes him to back trouble, and I believe is related to all three episodes. Now exactly what type of back injury or back trouble he had at that time, I am not certain. The only thing I know is that there is a history in Dr. Shapiro's report of back trouble.

Q. You mean what I have just read? A. Yes.

Q. And that back trouble was what he called his sacro-iliac jumping out of joint? A. Yes.

110 Q. And that you attribute to this congenital anomaly, is that correct? A. I think it's related to the congenital anomaly.

Q. Where is the sacro-iliac located in the back with regard to this congenital anomaly? A. Well, first of all I haven't agreed to this diagnosis of his sacro-iliac jumping out of place. I think there are many patients that may feel that their sacro-iliac joint jumps out of place, or is sprained, or describe back injuries in various ways that I do not—that do not reflect the true condition of the back.

Q. Are you then basing your diagnosis on just the description of some kind of back trouble of which you have no knowledge as to what it really is? A. I haven't made a diagnosis of that injury.

Q. I thought you were relying upon that injury as well as the two subsequent things as a basis for your diagnosis that this man's trouble stems from a congenital anomaly. Am I incorrect on that? A. I referred to a history of a back injury prior to March of 1958, but that is as exact as I can be about it. I don't know what his diagnosis was at that time.

Q. Not knowing what it was, what the diagnosis was, and just knowing that he had some kind of back trouble

111 which cleared up in three days, and he hasn't had any trouble with it since, do you still wish to rely upon that as being indicative of his trouble all stemming from a congenital anomaly? A. I think it's significant in that it indicates that he has had three separate episodes of back trouble.

Q. You feel that since he had three separate episodes of back trouble, this has significance. Do you feel that there is no significance in the fact that between the first episode and the second episode, a period of seven or eight years elapsed, and at the second episode there was in fact a trauma and fall and a strain. Does that have no significance, this long passage of time and then actual trauma to the back? A. I don't see anything particularly unusual about that in view of the presence of his congenital anomaly. That is the natural course of the disorder in many of these patients. They may have long periods of no trouble whatsoever, and then have severe back ache for on apparent cause, so that would certainly not indicate anything out of the ordinary.

Q. This man was born in 1914 and, based upon his history, had no trouble with his back until 1950 or 51, the early 1950's, which would be a period of some 36 years, and then had some kind of of undetermined sacro-iliac condition which bothered him for about three days, according to the report, and thereafter had no pain—no trouble whatsoever with this back for another eight years until he sustained a fall, and since that fall and injury has had
112 continual trouble with his back up until the present date.

Now on the basis of that, is it your contention that this is all due to a congenital anomaly? A. No, I don't feel all of his trouble is due to a congenital anomaly.

Q. Well, to what is this pain which he has suffered from March 28, 1958, due if not only to the congenital anomaly? A. Well, I have indicated one good possibility. It could possible be due to a congenital anomaly in his urinary tract, which we have not been allowed to check out.

Q. That is the only other thing you can think of, right, Doctor? A. No, sir, there are a number of things.

Q. What other things can you think of? A. Many patients have pain on the basis of emotional problems. That is certainly a possibility in this case. He could have pain on the basis of his congenital anomaly, or an arthritic change that may be present in conjunction with it.

Q. You didn't say anything like arthritic change here, did you? A. I haven't seen a specific arthritic change.

Q. Well then—— A. But that doesn't completely eliminate them as a possibility.

Q. There has been no mention of arthritic change
113 in the X-ray reports, has there, Doctor? A. No, sir.

THE DEPUTY COMMISSIONER: Dr. Tidler, does Mr. Dailey have any disability in relation to the history of any injury you obtained from him?

THE WITNESS: Disability as a result of the injuries?

THE DEPUTY COMMISSIONER: Yes, sir, either on the basis of direct causation or the premise of aggravation of a pre-existing congenital anomaly. Does he have any disability in relation to the history?

THE WITNESS: I don't believe that any of the injuries have been of such severity that they would be likely to cause permanent disability.

THE DEPUTY COMMISSIONER: All right.

By MR. INTRATER:

Q. Aren't there many times situations where a person will have a pre-existing perhaps congenital anomaly, perhaps not, but at least a pre-existing anomaly of some sort which is asymptomatic, that is to say, there is no pain involved, and that thereafter there will occur a trauma which will activate that and change that asymptomatic condition, isn't that very often true? A. It's possible, yes.

Q. And isn't that condition also possible with the type

of congenital condition that he has in this case? A.
 114 Well, it's possible in the sense that anything in
 medicine is possible, but I think it would be highly
 unlikely that that would be the situation here.

Q. And you feel that the pain that he has been suffering
 since March 28, 1958, and continues to suffer to the present
 time, is in no way attributable to the accident which he
 had on March 28, 1958?

THE DEPUTY COMMISSIONER: Ask the Doctor if there is
 any disability—

MR. INTRATER: If the Commissioner please, I would like
 to find out first of all about the pain; then I will go into
 disability.

THE DEPUTY COMMISSIONER: Well pain, I might tell you
 on the record, is not compensable.

MR. INTRATER: I am aware of that. This is just a prelim-
 inary question.

THE DEPUTY COMMISSIONER: All right, proceed.

MR. INTRATER: Will you answer the question, Doctor?

THE WITNESS: I am sorry. I don't remember exactly
 how you stated your question.

By MR. INTRATER:

Q. Is it your contention that if he has been suffering
 from March 28, 1958, in the way in which he alleges he
 has continues to suffer to the present date when he under-
 goes any bending or severe strain, that that is in
 115 no way attributable to the accident which he had on
 March 28, 1958? A. That is correct.

Q. Isn't it a fact that very often X-rays will not—one
 set of X-rays will not show up a certain condition, and
 that a subsequent set of X-rays will show them up? A.
 That is true.

Q. Such as a fracture? A. That is possible.

Q. And isn't it completely within the realm of not only
 possibility but of probability that the fact that the X-rays
 of May, 1958, did not reveal this fracture, and that the De

cember 16, 1958, X-rays revealed a suspicious radiolucent line, and thereafter the December 25, 1958, X-rays did disclose a fracture of the fourth lumbar transverse process, and thereafter even in March, 1959, the X-rays did disclose such a fracture, is this not equally consistent with the premises that the fracture was there but was just not disclosed in the April, '58, X-rays, as it is with the premises that this occurred sometime between the X-rays? A. No, I don't believe that is true. I have been over these films myself with the radiologist at Prince Georges Hospital, and there was no indication in talking with the radiologist that he thought it likely that there was a fracture on the original films.

Q. I am quite sure there was no fracture revealed
116 on the original film. The question is not whether it was revealed, but whether there was a fracture to the man's body at that time.

Doctor, would you mind demonstrating just whereabouts this fourth lumbar transverse process is located in the body? Demonstrate on your own body. A. All right. (Witness rising and demonstrating.) It's approximately here.

THE DEPUTY COMMISSIONER: Let the record show the witness is pointing to an area on the left side of his back about two or three inches above his waist line. Would that be about right, Doctor?

THE WITNESS: Yes, sir.

MR. INTRATER: I suggest to the Commissioner that the area to which he was pointing is similar if not identical to that demonstrated by the Claimant.

THE DEPUTY COMMISSIONER: All right, let the record so state.

MR. INTRATER: I am sorry you sat down and put on your coat, Doctor. I would like one more demonstration.

BY MR. INTRATER:

Q. Now you stated before when I questioned as to what might possibly cause this, that this might be the result of

an emotional condition, is that correct? A. I said that pain of this type can be caused on an emotional basis.

117 I didn't specifically say that Mr. Dailey's pain was caused by that.

Q. This Dr. Shapiro whose report you referred to—that is, Dr. Hyman D. Shapiro. He is a neurosurgeon, is that right? A. Yes.

Q. And you received his report? A. Yes, sir.

Q. And this is the report that you handed me, is that correct? A. Yes, sir.

Q. Isn't it a fact that in his report he said: "If, as reported, he shows no orthopedic evidence of disease and the X-rays show only a congenital deformity of his lower spine, I am unable to account for his symptoms. This is not a neuropsychiatric condition."

Isn't that what he states in his report? A. Yes, sir, that is correct.

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120 BY MR. INTRATER:

Q. Doctor, you testified that during the period of treatment from December 8, 1958, through August 17, 1959, that with regard to trying to go back and work, and going back to work, et cetera, that Mr. Dailey pretty much

121 followed your advice, is that correct? A. Yes.

Q. So then under the circumstances would you say that it was your advice for him not to return to work from December '58 until June 29, '59, when in fact he did return to work? A. I can't be certain of that entire time without reviewing my reports.

Q. Well, do you have all of your records here? A. I believe so.

Q. Would you look them over and see if there is anything to contradict your general memory that he did follow your advise? A. One thing I can tell you. When I saw him on December 9, 1959—

Q. No, no, no. I am talking about the period from December, 1958, I guess it was December 5 when you first

saw him, 1958, through August 17, 1959. That was the period of time of treatment. Now do your records reflect anything that would contradict your general memory that you have testified to, that during the period of time with regard to his going back to work and starting to work a little, et cetera, that he followed your instructions?

THE DEPUTY COMMISSIONER: So we don't confuse the Doctors, I think you should tell him that the man did go back to work on June 29th. I thought you said it was August.

122 MR. INTRATER: His treatment was from December 5, '58, through August 17, 1959. Now the man went back to work for the first time on June 29, 1959. Now the Doctor testified that throughout the period of treatment, his recollection is that with regard to going back to work the man followed his advice. Now I am asking him specifically whether his records disclose anything to contradict that or to correct the inference stemming from that, that he was off work until June 29, 1959, on the Doctor's advice.

THE WITNESS: Yes, I think that at the time he returned to work, that it depended more on Mr. Dailey and how he felt than it did on my advice actually, because in my report of March 16, 1959, I have, Mr. Dailey has remained ambulatory but has not returned to work because, he states, stooping and bending caused his back pain to become worse. He occasionally tries to do light work around the house, and states this also aggravates his back pain. He has been unable to wear a back support, stating that this causes the back pain to increase.

There was nothing on physical examination during this time that would have precluded him returning to work. He was limited by pain, which is a subjective symptom.

THE DEPUTY COMMISSIONER: During what period, Doctor? During this entire period from December until August, 1959?

You testified that there wasn't anything physically
123 which would preclude him from turning to work.
During what period?

THE WITNESS: I would say from January, 1959, on I don't believe there was any physical condition that would have precluded his working, but he was limited by complaints of pain.

BY MR. INTRATER:

Q. By physical condition you mean an objective symptom? A. Yes.

Q. Now the fact that he had pain and continued to have severe pain upon bending, wouldn't that be a physical condition? It would be a subjective symptom, but a physical condition. A. But if he had come into my office at that time and told me he was free of pain, or that his pain was not bad, I would have felt it was perfectly all right for him to go ahead and work.

Q. But he continued to complain of pain, isn't that correct? A. Yes.

Q. So actually he did have a condition, if you assume that he was telling the truth concerning this pain upon bending; he did have a condition which prevented him from going back to work? A. He was prevented by a subjective symptom.

THE DEPUTY COMMISSIONER: Was that due to the
124 injury or due to the congenital anomaly?

THE WITNESS: Well, I think at the stage of approximately a month after I had seen him, I think he was well past any time when he could have been expected to have been having pain from any injury at the time I first saw him.

THE DEPUTY COMMISSIONER: I am talking about disability, Dr. Tidler. Compensation is not payable for pain unless the pain creates disability. Was Mr. Dailey at any time during the time that you saw him for treatment or examination, either by yourself or in consultation, was

Mr. Dailey disabled by virtue of any injury he sustained as related to you in his history?

THE WITNESS: No, sir, I don't believe so.

BY MR. INTRATER:

Q. Now, Dr. Tidler, I—may I see your report of March, 1959? A. Yes.

Q. Do you, incidentally, have any other reports that we don't know about? A. I assume they are all in.

Q. Do you have any other than December, '58, December '59, and this March '59 report? A. December, 1958—

MR. INTRATER: I trust that the Commission's file does reflect this report of March, '59, doesn't it?

125 THE DEPUTY COMMISSIONER: Off the record.

(Discussion off the record.)

THE WITNESS: The second one I have is March of '59.

THE DEPUTY COMMISSIONER: Mr. Mazzuchi, I hate to say this, but I am conducting a hearing.

MR. MAZZUCHI: Yes, sir.

THE WITNESS: I have a report to the Metal Lathers Union that I gave Mr. Dailey at his request on May 21, 1959.

MR. INTRATER: May I see that also, and your report of March '59?

(Documents handed to Mr. Intrater.)

THE WITNESS: And the other one is the one I have given to you.

THE DEPUTY COMMISSIONER: Proceed, Mr. Intrater.

BY MR. INTRATER:

Q. Doctor, is it your contention that Mr. Dailey received any injury at all on March 28, 1958? A. Yes, I believe he did.

Q. And did this injury result in any disability at all? A. Yes, I think it might have resulted in some temporary partial disability. Of course, I didn't see him until De-

ember of 1958, so I can't be certain of his condition at that time.

Q. Now, was there any disability resulting from
126 that injury in your opinion when you saw him in
December of 1958? A. No.

Q. Doctor, your December 13, 1958, diagnosis shows
Sprain, old, moderately severe, affecting the lumbar spine.

Now is it your statement now that ~~that~~^{that} was not your
diagnosis of December, 1958? A. That was my diagnosis
at that time, yes, sir.

Q. And isn't this sprain that you are talking about—
didn't you formally identify to me that that sprain was
the sprain which occurred on March 28, 1958? A. At that
time I felt that it was possible he was having trouble from
this old sprain.

Q. Well now, I don't understand your position, Doctor.
You stated just a moment ago that you do not feel that
in December of 1958 he had any disability as a result of
the March 28, 1958, incident, and yet you admit that your
December 1958 report shows as your diagnosis this sprain.

Do you mean that since that time you have changed your
opinion? A. Yes.

Q. And where on your reports that you have made here
do you at any place show a change in your diagnosis?

Isn't it a fact that in December, 1958, you were already
aware of this congenital anomaly at the time you made
a diagnosis of the 1958 sprain causing him— A.

127 Well, I think that was my No. 1 diagnosis, and
the sprain was No. 2.

Q. Well, if you were aware of it at the time of that
diagnosis, what since then caused you to change your diag-
nosis? A. That was December of 1958, I believe.

Q. That is right. A. Since that time Mr. Dailey had been
examined and re-examined by me on numerous occasions,
and he had been seen by a neuropsychiatrist, a neurosur-
geon, and an orthopedic surgeon. He had had further X-
rays of his back, and it was as a result of this entire series

of events subsequent to that time that I have changed my opinion.

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128 BY MR. INTRATER:

Q. Doctor, am I to understand that you are withdrawing your diagnosis of December 13, 1958, in which you diagnosed him as having a sprain, old, moderately severe, affecting the lumbar spine? A. I don't have that as a final diagnosis.

Q. That is your diagnoses of December 13, 1958.

THE DEPUTY COMMISSIONER: The doctor has testified that is not the final diagnosis.

BY MR. INTRATER:

Q. I want to know what your diagnosis as of December 13, 1958, was. I understood you were withdrawing that. A. I didn't say I was withdrawing that.

Q. Do you still subscribe to your diagnosis of December 13, 1958, that at the time you saw him he was
129 suffering from a sprain, old, moderately severe, affecting the lumbar spine? A. I think it was likely that he was at that time, yes, sir.

Q. That he was? A. Yes.

Q. Well then, do you wish to withdraw your statement that by the time you saw him he was no longer suffering any of the affects of the accident of March 28, 1958? A. I didn't say that I felt that the sprain that he had at that time was necessarily due to the result of the injury in March of 1958. He could have had multiple injuries in his back in the subsequent time.

Q. You have testified to that today. I asked you on a number of occasions, this sprain that you refer to, is that sprain the result of the accident on March 28, 1958, and on each occasion you said yes.

Now is it your testimony that this sprain is not referring to the injury sustained on March 28, 1958? A. Well, I think I can clear this up for you. At that time I put

down, I believe, sprain, old, affecting the lumbosacral spine.

Q. Right. A. That didn't necessarily indicate that all of his trouble was due to his old sprain. He carried a diagnosis of an old sprain at the time of his previous injury—I felt that he had a sprain of his back at the time of his injury in March, 1958. I did not mean to indicate by putting it down on that report that all of his trouble was due to it in 1959.

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AFTERNOON SESSION

(2:37 p.m.)

THE DEPUTY COMMISSIONER: Let the record show that Dr. Weaver is here as a witness for the Claimant, and Mr. Dailey is still off the stand temporarily.

Come forward, Doctor.

Thereupon,

Dr. Frank Lloyd Weaver, Jr.

was called as a witness on behalf of the Claimant and, having been first duly sworn by The Deputy Commissioner, was examined and testified as follows:

THE DEPUTY COMMISSIONER: Please give the reporter your full name and address.

THE WITNESS: Frank Lloyd Weaver, Jr., 320 Montgomery Street, Laurel, Maryland.

THE DEPUTY COMMISSIONER: Will you qualify the Doctor, Mr. Intrater? I haven't had the privilege of having him here previously.

DIRECT EXAMINATION

By MR. INTRATER:

Q. Doctor, what is your occupation or profession? A. I am a physician in general practice.

Q. How long have you been engaged actively in the general practice of medicine? A. Since 1953.

Q. Where did you receive your medical education?
137 A. George Washington University.

Q. When did you graduate from the George Washington Medical School? A. 1950.

Q. Where did you train after graduating from George Washington? A. My internship was at the Detroit Public Health Service Hospital.

Q. When did you take your examinations, general examinations? A. It's difficult to answer that question. We take them, a series of them, beginning at the end of the second year of medical school.

Q. When did you complete them? A. I completed them in 1953, including the examination for private practice.

Q. Now, with what hospitals if any are you associated in the District of Columbia? A. In the District of Columbia? The Prince Georges General Hospital, Leland Memorial, and the Laurel Hospital.

Q. Other than your internship in Detroit, where did you go after you left the hospital up there? A. To the outpatient department of the Public Health Service in Washington, Surgical Clinic.

Q. How long were you situated there, and in what capacity? A. I was there for two years, one year acting as a surgeon, although I have no specialized surgical training, with limited functions of course as a surgeon for one year in the outpatient department.

The second year I was in charge of the Medical Examinations Clinic in the Public Health Service, located at the same place.

Q. You were there for a total of two years? A. Yes.

Q. Then you went into private practice? A. Yes.

Q. And that was here in the District of Columbia? A. In Laurel.

Q. Have you continued since then to practice in Laurel?
A. Yes, sir.

THE DEPUTY COMMISSIONER: Do you have a specialty?

THE WITNESS: No, sir.

THE DEPUTY COMMISSIONER: Any questions on the qualifications of Dr. Weaver?

MR. MAZZUCHI?

MR. MAZZUCHI: No, sir:

THE DEPUTY COMMISSIONER: Mr. Cooney?

MR. COONEY: No, sir, none.

MR. MAZZUCHI: As a general physician.

139 THE DEPUTY COMMISSIONER: Proceed, Mr. Intrater.

BY MR. INTRATER:

Q. Dr. Weaver, how long have you known Mr. Wilburt Dailey? A. Six years.

Q. Do you know the occasion when you first saw him? A. By referring to my records I will.

The first occasion that I saw him was in September of 1955 with a upper respiratory infection, and I did not see him again until 1958 as a patient.

Q. Now what was the occasion when you saw him in 1958? A. I was called to his home in Beltsville. I was called by his wife. She felt she had an emergency situation with her husband as he had acute pain in his back and was unable to move.

I found him in that condition.

Q. Approximately when in 1958 was this? A. It was on the 1st of April.

Q. Now, what diagnosis and treatment did you prescribe for him? A. My initial impression—which there was no reason to change—was acute right lumbosacral strain, and he had some sciatic neuritis in the posterior part of the right leg and was unable to walk.

Q. Did he state at that—did he at that time give
140 you a history as to the onset of that pain? A. If he did, I don't have a record of it. I am sure he did, but at that time I was not involved with how it happened, but rather the condition I found him in.

Q. Now, what did you prescribe for this pain? A. Sedatives and bedrest.

Q. When did you see him next? A. I saw him again later the same day, or at night, I don't know which, but I saw him twice on that same day. He was running some fever the first time that I saw him, so the exact cause of the pain was undetermined, and I gave him antibiotics and saw him later in the day, and either the antibiotics or the rest or the sedation had made him feel better, and he was able to come into the office for treatment.

Q. When you saw him at first it was at his home? A. Yes.

Q. Now, what treatment did you continue to give him after that? A. Diathermy, in the office.

Q. And for how long a period of time and how often did you see him? A. The first time I saw him was on April 1st, and I saw him thereafter daily in the office until the 12th of April.

THE DEPUTY COMMISSIONER: 1958?

THE WITNESS: Yes.

141 BY MR. INTRATER:

Q. And what treatments did you give him? A. Daily diathermy.

Q. Did you give him anything in the nature of medication of any sort? A. Yes, I gave him a muscle relaxant.

Q. Now, what about after April 12, 1958, did you see him after that at any time? A. I didn't see him again until January 31st of 1959, and as I understand—his wife called me, and the carrier had asked him to be seen by an orthopedic specialist, and I had no contact with him during that time, and no reports.

Q. You mean this was during the period of time up until January? A. Yes, sir, a period of eight or nine months; I had no official contact at all during that time with this case.

Q. What was the occasion on which he came back to you on January 31st? He came back to you on January 31st? A. He came back—

THE DEPUTY COMMISSIONER: Ask the doctor if he got a history of any injury from the man.

MR. INTRATER: I will.

MR. MAZZUCHI: I believe he already asked it.

BY MR. INTRATER:

Q. Did you receive any history from him concerning an injury, if any, sustained on March 28, 1958? A. Yes, I did, but that was verbal and I have no record of it here.

If I may explain that: I was taking care of a heart attack at the same time this was occurring—that is, that initial day, so I saw him in very much of a hurry to give him relief, and back to this heart problem, and as a result I don't have any detailed history, and that is the reason for it not being here. But I do have a verbal recollection of his having strained himself at work.

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143 THE DEPUTY COMMISSIONER: All right.

The objection is overruled.

Did you receive any history of any injury, or any claimed injury, or any claimed consequence of work performed by Mr. Dailey while he was under your care from April 1, 1958, to April 12, 1958?

Did you know why you were treating him?

THE WITNESS: Yes.

144 THE DEPUTY COMMISSIONER: Why were you treating him?

THE WITNESS: Because he said he had hurt himself at work.

THE DEPUTY COMMISSIONER: How did he hurt himself, did he say?

THE WITNESS: Well, you are asking me to recall something that I don't have a record of, as I told you.

THE DEPUTY COMMISSIONER: Well, I will take your memory. You are a physician. Not all doctors put everything down.

THE WITNESS: My only recollection is that he said he had fallen from this scaffold and had strained his back.

This is the extent of my recollection.

THE DEPUTY COMMISSIONER: All right, proceed.

BY MR. INTRATER:

Q. Now, Doctor, what condition did you find him in when you saw him in January, January 31, 1959? A. He told me—this is not in my records, but he told me he had been under treatment, and he did not feel he was responding, and he was still having a lot of pain in his back, and so I said I would try one thing I was sure hadn't been tried, which is a—well, it's a form of treatment, of shock, which I gave him to see if that would help, and told him to come back in two days. He did, and he was no better, and I repeated the shock and referred him to Dr. Jack
145 Sugar, an orthopedic surgeon.

EXAMINATION BY THE DEPUTY COMMISSIONER

BY THE DEPUTY COMMISSIONER:

Q. Was Mr. Dailey disabled when you saw him in April, 1958? A. I would say partially disabled. He was having considerable pain in his back. I believe he was able to work, but not to do heavy work or lifting.

Q. Did you see him the last time on April 12, 1958? Is that what your records show? A. The last time—

Q. During 1958? A. Yes, sir, that is right.

Q. Can you tell me what your opinion was as to whether he had any disability on April 12, 1958? A. He did have disability, yes, sir. I believe at that time I would consider him totally disabled. But he did not come back for treatment.

Q. That was the last treatment you gave him, April 12, 1958? A. Yes, but then—that was the last time, and then later in the month—rather in May of '58 I received a message that he had gone back to work on the 12th of April.

Q. When you last saw him on April 12, 1958, was it
146 your opinion that he had some disability? A. Yes,
sir.

Q. Do you know how much? A. I would say total disability for laboring work, and some partial percentage of disability for perhaps a foreman-type work.

Q. How long in your opinion as of April 12, 1958, would that partial disability last? Was it permanent partial?
A. I did not consider that it would be, no, sir.

Q. Would you consider it temporary partial? A. You mean what would my opinion have been at that time?

Q. Well, what was your opinion as of April 12, 1958, when you last treated him and you testified he couldn't do his regular work, but could do light work. A. That he probably would have no disability eventually; that perhaps for a period of a year he would have a partial disability. That was my estimate of the situation at that time.

Q. From the strain of the back? A. Yes.

Q. And how much partial disability would you say he had as of April 12, 1958? A. I don't know how to answer that question, because. I considered he would be
147 totally disabled for a laboring type of work, and
perhaps 20 or 30 per cent for a foreman-type of work.

Q. You say a laboring type of work. You mean the type of work that Mr. Dailey was doing when he came to you? A. If that is what he was doing.

Q. Do you know what he was doing? A. He was a carpenter, and that is as much as I know, and if his work involved climbing, stooping and lifting, I would consider him totally disabled for that particular type of work at that time.

Q. Dr. Weaver, did you ever see any X-rays in this case?
A. I have only the reports. They were taken at Prince Georges Hospital, and the doctor's analysis of those X-rays I do have a record of.

Q. The X-ray report of the X-ray taken of Mr. Dailey on April 5, 1958, you have seen? A. (Nodding affirmatively.)

Q. Show that the Doctor said yes instead of nodding. A. I am sorry.

Q. Do you have the X-rays with you? A. No.

Q. You just have the report from the radiologist? A. That is correct.

Q. Was that X-ray taken at your request? A. Yes, sir, at my request.

148 Q. What does it say? A. The initial X-ray of April 5, 1958, as interpreted by Dr. Stecher, reads: "Examination of the lumbosacral spine discloses marked straightening of the lumbar curve. There is definite and marked narrowing of the disc at the level between the 3rd and 4th lumbar vertebrae, which strongly resembles an incomplete fusion, namely, a so-called congenital block vertebra. There is no evidence of spondylolisthesis. There is slight wedging effect of T-12, which may be due to positional strain or possibly an old osteochondritis. There is fusion of the 3rd and 4th lumbar spinous processes, which is rather conclusive that this is a block and congenital deformity at this level."

THE DEPUTY COMMISSIONER: Proceed, Mr. Intrater.

DIRECT EXAMINATION (Resumed)

BY MR. INTRATER:

Q. Now, did you subsequently receive any further X-ray reports from Dr. Stecher? A. I did, and I have a report of the repeat X-ray taken on the 16th of December, 1958.

Q. Would you read that report please?

MR. MAZZUCHI: Just a moment.

EXAMINATION BY THE DEPUTY COMMISSIONER:

BY THE DEPUTY COMMISSIONER:

Q. Let me ask you, Doctor Weaver: You had Mr. 149 Dailey under your treatment from April 1, 1958, through April 12, 1958? A. Yes.

Q. And this X-ray was taken at your direction on April 5, 1958? A. Yes.

Q. Would you testify that the X-ray report, in conjunction with your report, revealed that Mr. Dailey had a congenital anomaly between the lumbar 3rd and 4th vertebrae? A. That is correct.

Q. Was that congenital anomaly in anyway aggravated, precipitated, triggered or augmented in its severity by the history you obtained from him? A. The way you phrase the question, I would like to answer—

Q. Proceed. A. The anomaly itself, of course, was not aggravated by anything, nor could it be. The presence of the anomaly would make him more subject to back trouble.

Q. Is it your testimony that the congenital anomaly was a predisposing factor to a strain? A. Certainly I would expect it would be one of those things. It is purely conjecture, but our experience has shown these people do have more tendency to back strain.

Q. Did you read in that report from the roentgenologist any evidence of a fracture of the left transverse process? A. Not in this film.

THE DEPUTY COMMISSIONER: All right, proceed, Mr. Intrater.

DIRECT EXAMINATION (Resumed)

BY MR. INTRATER:

Q. What did the subsequent X-rays show—

MR. MAZZUCHI: Just a moment. It is at this point that I would like to enter an objection. I object to the Doctor reading any further X-ray reports on the grounds that they were neither ordered at his request, nor do we have any testimony that he reviewed these films.

THE DEPUTY COMMISSIONER: I believe the Doctor has testified that he—this X-ray was made at his request.

MR. MAZZUCHI: That is right, and as to that I have no objection, but as to the subsequent X-ray—

MR. INTRATER: I will withdraw my question.

BY MR. INTRATER:

Q. Did you receive a subsequent X-ray report? A. Yes.

Q. And what is the date of that report? A. December 16, 1958.

Q. And by whom was the report made? A. By Dr. Stecher.

Q. Did you thereafter receive another X-ray report? A. Yes.

Q. What is the date of that report? A. 12-25-58.

Q. And by whom was that made? A. By Dr. Stecher.

Q. And the December 12, 1958, report concerned a spot film? A. The spot film was 12-25-58.

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152 BY MR. INTRATER:

Q. Doctor, assuming that Mr. Dailey stepped down from a scaffolding several feet above the level of the floor to a scaffolding approximately 18 inches from the floor. Assuming furthermore that Mr. Dailey then fell from that scaffolding to the floor, landing on all 4's. Assuming furthermore that without feeling any pain in his back at that time, he arose and immediately proceeded approximately 150 feet to a place where some channel irons lay, and he bent over to pick up—in an attempt to pull out and move this channel iron, along with the assistance of other persons, and he was pulling from left to right on this channel iron. And at that time he felt an acute pain in the lower left area of his back several inches above the waist level. [sic] Assuming furthermore, Doctor, that at sometime in the early 1950's he had seen another Doctor for a condition which he described as his sacro-iliac jumping out, and that on that occasion after three days this condition disappeared and he no longer felt any effects of that from that time on. Then assuming further, Doctor, that after the occasion of March 28, 1958, he thereafter in December, on December 3, 1958, while working and while walking about and without any specific accident

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occurring to himself, continued to feel increasing pain whenever he would bend over, until finally at that time the pain became so unbearable that he felt he could not continue to work. Also, Doctor, on the basis of the X-ray reports which you have received, and assuming all the foregoing, have you formulated an opinion as to the effect of the accident of March 28, 1958, on this man's disability that you observed? A. Is your question, could I consider there is a causal relationship between the——

Q. My first question is, have you formed an opinion?
A. I have, yes.

Q. Now, what is your opinion? A. My opinion is that there is a causal relationship.

Q. And will you describe that please—explain that? A. It is my opinion that the combination of this congenital anomaly that he has in the back, the combination of that and the injury that is supposed to have been sustained in March, the combination of those two things have resulted in what disability has resulted since.

Q. Now, Doctor——

THE DEPUTY COMMISSIONER: What disability has resulted since?

THE WITNESS: He is unable to perform the work
154 that he did before this accident.

EXAMINATION BY THE DEPUTY COMMISSIONER

BY THE DEPUTY COMMISSIONER:

Q. What type of disability does he have? What is his disability? A. Well, his disability at that time——

Q. As of now. You made "disability" an integral part of your answer to Mr. Intrater's question. What disability does he have now which makes you tell me that the disability he has now is a combination of the injury of March 28, 1958, and the pre-existing anomaly of the lumbar 3rd and 4th vertebrae? What is his diagnosis? What condition does he have? What is wrong with this man?

You last treated him on April 12, 1958, and then you

saw him January 29th. A. At that time, pain and tenderness in the right lumbar muscle group.

Q. They are merely symptoms aren't they, Doctor? What is the diagnosis? What is the disability? A. Well, there often is not a diagnosis. A man can have pain and tenderness in a muscle that would not be demonstrable by X-rays, operation, or pathological examination of the muscle tissue, and still the man will suffer. We know that to be a fact.

Q. Well, disability is an outgrowth of an injury.
155 What injury does he have? A. He has chronic back strain as a result of an acute back strain.

Q. Well, did he have this chronic back strain prior to March 28, 1958, by virtue of the pre-existing anomaly? A. No.

Q. Well, did he have an anomaly prior to the injury of March 28, '58? A. Yes.

Q. Didn't that predispose him to back strain? A. Yes.

Q. In other words, would it be your testimony that the presence of the anomaly of the lumbar 3rd and 4th vertebrae predisposing him to back strain, would create an area of a potential chronic back strain? A. That is what I have testified.

Q. Well, does the chronic back strain, was that aggravated by virtue of the alleged injury of March 28, 1958, or was it static? A. I don't believe it existed until the injury; at least it had never been mentioned to me, and he had never come to me as his physician with any back trouble until this injury, so I am assuming he had no trouble before that.

Q. To give you the benefit of the testimony before the Deputy Commissioner, Doctor, Mr. Dailey testified,
156 in answer to questions put to him by Mr. Mazzuchi, who represents one of the respondents, that he had some trouble with his back back in 1950. He was off a few days—sacro-iliac strain—and that he never had any further trouble, I believe, until March 28, 1958. But I am

not interested in that, Dr. Weaver, I am interested in your testimony that this man's disability as of now is the result of his anomaly of the lumbar 3rd and 4th vertebrae, coupled with these injuries. A. Yes, that is my opinion.

Q. Did the injury of March 28, 1958, for which he received treatment from you through April 12, 1958, and you never saw him again until sometime in January, 1959, did that produce such an aggravation of this pre-existing anomalous condition that aggravated a chronic back strain, is that your testimony? A. The chronic back strain in my opinion was the result—resulted from the acute strain in March. The acute phase was over when I saw him last, but he had a rather severe chronic condition then.

Q. Had the chronic condition existed prior to the day you saw him? A. Prior to the initial injury, no.

Q. Is it your— A. The anomaly was present, but it was causing him no trouble.

157 Q. Is it your testimony that by virtue of this incident of March 28, 1958, after April 21, '58, it developed into a chronic back strain? A. Yes.

THE DEPUTY COMMISSIONER: Proceed.

DIRECT EXAMINATION (Resumed)

BY MR. INTRATER:

Q. Doctor, did you learn from the X-ray reports that you have seen that this man also apparently in December of 1958 had—I don't mean he received it then, but as of that time did he have a fracture of the 4th lumbar transverse process? A. Yes.

Q. What effect if any—do you have an opinion as to whether this condition had any effect upon his disability? A. Undoubtedly this fracture that apparently he sustained would be one more factor to add to the anomaly in his back, one more factor to contribute to a chronic strain or weak back condition.

Does that answer your question? And it undoubtedly prolonged his initial disability, the fact that he had that, although it did not show on the first film.

Q. Doctor, do you have an opinion as to when this fracture to the 4th lumbar transverse process occurred? A.

I am no more qualified to testify to that than you
158 or anyone else would be. Presumably it was from that injury, although the X-rays don't substantiate that. That is not unusual.

Q. What is not unusual? A. For it to fail to show—

MR. MAZZUCHI: I am going to object to this line of testimony. This man is not a qualified roentgenologist.

MR. INTRATER: I don't think Dr. Tidler at any time was qualified as a roentgenologist, but he testified—

MR. MAZZUCHI: I am talking about his testimony—

THE DEPUTY COMMISSIONER: Overruled.

The Doctor has already testified that he is not competent to testify as to the origin of the X-rays.

THE WITNESS: In case it is not already in the record, frequently a fracture will occur—I have seen this many times—and will not be visible on the first film, and will not actually be visible until the healing process sets in.

By MR. INTRATER:

Q. Isn't that in fact a quite ordinary situation? A. Yes.

Q. And the first films were taken within a week, isn't that correct, of the— A. Yes—well, it was taken the 5th of April.

Q. As opposed to the accident on March 28, 1958.
159 THE DEPUTY COMMISSIONER: In the meantime, this

man worked from April 20, '58, and an X-ray was taken eight months later, wasn't it?

THE WITNESS: Yes.

THE DEPUTY COMMISSIONER: And in your first X-ray, the X-ray you ordered on April 5, 1958, the roentgenologist told you there was no fracture, is that right?

THE WITNESS: That is correct.

By MR. INTRATER:

Q. Doctor, has Mr. Dailey told you anything concerning whether he currently has any pain upon bending or any kind of strain on his back?

THE DEPUTY COMMISSIONER: By currently do you mean, Mr. Intrater, the last time the Doctor saw him? You haven't seen him since 1959 have you, Doctor?

THE WITNESS: Yes, he came into my office, for examination really, on May 5, '61.

THE DEPUTY COMMISSIONER: When was the last time you saw him before May 5, 1961?

THE WITNESS: That was in February of '59, when I referred him to Dr. Sugar.

THE DEPUTY COMMISSIONER: Proceed.

BY MR. INTRATER:

Q. When you saw him this year, did he at that time register any complaints concerning pain upon bending
160 or any kind of strenuous exercise of the back? A. Yes, he did.

Q. Do you have any opinion now concerning any permanent disability of Mr. Dailey?

THE DEPUTY COMMISSIONER: Ask him if he examined him at that time.

BY MR. INTRATER:

Q. Did you examine him at that time? A. Yes.

THE DEPUTY COMMISSIONER: What did you find?

THE WITNESS: Physically all that I found was a tenderness in the muscle group, and it seemed like he had some enlargement of the left lumbar muscle group, and tenderness to touch.

THE DEPUTY COMMISSIONER: What was the diagnosis?

THE WITNESS: Chronic back strain.

THE DEPUTY COMMISSIONER: All right.

BY MR. INTRATER:

Q. And have you formed an opinion as to the permanency of this condition? A. Well, legally or officially, no. I don't see how I could.

THE DEPUTY COMMISSIONER: Has he reached the limit of recovery, medically speaking?

THE WITNESS: I don't know. I think he is perhaps totally disabled at this moment for heavy work, but certainly that condition should be evaluated periodically.

THE DEPUTY COMMISSIONER: Does he need any treatment?

THE WITNESS: I would say no.

THE DEPUTY COMMISSIONER: Did he need any treatment when you last saw him in February of '59?

THE WITNESS: Yes.

THE DEPUTY COMMISSIONER: What kind of treatment did he need?

THE WITNESS: I didn't know and hadn't formed a good opinion as to how much disability the man had and how much work he ought to do, and for that I referred him to the orthopedic surgeon.

THE DEPUTY COMMISSIONER: Did you ever see him after February, 1959?

THE WITNESS: Not until he came into my office in May.

THE DEPUTY COMMISSIONER: Did you call for him?

THE WITNESS: No.

THE DEPUTY COMMISSIONER: Proceed.

BY MR. INTRATER:

Q. What is your opinion concerning—as of the last time you examined him concerning his disability? A. I considered him totally disabled for heavy, laboring work. For a foreman type of work, I think he could do that with a hundred per cent efficiency, but probably with some pain and discomfort.

Q. Am I to understand that at the present time you do not feel that it can be stated whether this condition now is permanent, but that it should be re-evaluated periodically? A. That is right. This may be entirely cleared up a year from now, or it may be that 20 years from now it will be the same as it is now. There is no way of prognosticating.

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BY MR. INTRATER:

Q. Do I understand you attribute this disability which you have now described to the congenital anomaly, in conjunction with the accident of March 28, 1958?

163 A. I have no choice but to attribute it to that. I do consider the man somewhat disabled at this time, as I have already testified. I have not been informed of any injury other than the one mentioned.

Now this case has been taken by the carrier out of my hands completely, and I have not had a chance to follow it with any continuity at all. I have no reports from those that have been seeing him, and I think that only a limited amount of information should be expected of me really. He has not been my patient except on very widely scattered occasions in this case.

MR. INTRATER: I have no further questions of the Doctor.

THE DEPUTY COMMISSIONER: All right, Mr. Mazzuchi.

CROSS-EXAMINATION

BY MR. MAZZUCHI:

Q. Doctor, when you last saw this patient on April 12, 1958, did you expect him to return to you for further treatment? A. I did.

Q. And when he returned to you—when he did not return to you for further treatment, did you have an opinion as to when he would be able to return to work? A. I hadn't formed an opinion at that time. He was still under
164 treatment.

Q. When did you form an opinion as to when he should return to work? A. When I was subsequently informed that he had already returned to work, which was about ten days after the last time I saw him.

Q. When was that? A. I believe on the 6th of May, but I am not certain of that.

THE DEPUTY COMMISSIONER: 1958?

THE WITNESS: 1958. I was informed that he had returned to work.

BY MR. MAZZUCHI:

Q. Now, at that time did you feel that he had any disability? A. He had disability when I saw him on the 12th.

Q. Well, in May when you heard that he had gone back to work, did you feel that he had any permanent disability? A. I didn't see him, I don't know. He may have gone back to work with no pain or disability of any kind, I just don't know.

Q. Did you express an opinion concerning his disability by reason of your treatment of him? A. No.

165 Q. You never expressed such an opinion? A. Let me understand your question—

MR. MAZZUCHI: May I see the Bureau's file?

(File handed to Mr. Mazzuchi.)

BY MR. MAZZUCHI:

Q. You want to understand my question, Doctor. A. Yes. You may be asking me something on which I have already written a letter, and I don't want to contradict myself if I can help it.

Q. I will save you the trouble, sir.

Is this your medical report dated May 7, 1958? (Exhibiting document to the witness.) A. Yes.

Q. This 304 form to the Bureau of Employee's Compensation. A. That is my report.

Q. And is that your signature? Frank Weaver. A. That is correct.

Q. I will call your attention, Doctor, to the answer to question No. 7 on this report.

"Will the injury result in (a) Permanent defect?"

What did you answer? A. "No."

Q. I will call your attention, Doctor, to question No. 20: "Patient was able to resume regular work on what date?"

166 What was your answer? A. I answered, 4-15-58, and subsequently amended that to 4-21.

THE DEPUTY COMMISSIONER: 1958?

THE WITNESS: Yes.

BY MR. MAZZUCHI:

Q. So you did have an opinion as to when he could go back to work in May? A. In May I had an opinion—this was, I believe, written on the 7th of May.

Q. Yes. A. And so it really was filled out in retrospect.

Q. And you also had an opinion on that day that he had no permanent disability, isn't that correct? A. That is correct.

MR. MAZZUCHI: I have no further questions.

THE DEPUTY COMMISSIONER: Mr. Cooney?

MR. COONEY: I have no questions.

THE DEPUTY COMMISSIONER: Any further questions, Mr. Intrater?

REDIRECT EXAMINATION

BY MR. INTRATER:

Q. Am I to understand that the last time you—prior to filling that report, the last time you saw Mr. Dailey he was at that time totally disabled to work, is that correct? A. Yes.

Q. And you did not see him from that time on until filing this report, is that correct? A. When I filed—I saw him on the 12th and he didn't return for further treatment, and then about ten days later—roughly ten days later—I don't know who called me, someone called me—with the information that he had already gone back to work.

Q. And it was on the basis of the information that he had already gone back to work, that you completed this form as you did? A. That is correct.

MR. INTRATER: Thank you Doctor. No further questions.

MR. MAZZUCHI: I have one more question.

RE-CROSS-EXAMINATION

BY MR. MAZZUCHI:

Q. Doctor, did you ever review these X-ray films? A. No, sir, I did not. I rarely do when Dr. Stecher reads them.

MR. MAZZUCHI: I have no further questions.

THE DEPUTY COMMISSIONER: You may be excused, Dr. Weaver.

MR. INTRATER: Thank you very much, Doctor.

(Witness excused.)

168 THE DEPUTY COMMISSIONER: All right, Mr. Dailey, return to the stand.

Thereupon,

Wilburt E. Dailey

the Claimant here, was recalled as a witness for and in his own behalf and, having been previously duly sworn by The Deputy Commissioner, was examined and testified further as follows:

THE DEPUTY COMMISSIONER: All right, Mr. Mazzuchi.

CROSS-EXAMINATION (Resumed)

BY MR. MAZZUCHI:

Q. Now, Mr. Dailey, after Dr. Tidler treated you following the incident of December, 1958, were you ever examined by any other Doctor? A. December, 1958?

Q. Yes. A. I think Dr. Neviator, yes, and Dr. Sugar.

Q. And Dr. Murphy? A. And Dr. Murphy.

Q. Any other doctors? A. I guess that is all.

Q. Did you ever submit to any— A. Dr. Shapiro, I guess.

169 Q. Did you ever submit to any X-ray studies or examinations by any doctor for your kidneys? A. Have I?

Q. Yes. A. No.

Q. This heating pad which you said you had at home, did you use that heating pad at the time when you first hurt your back in 1951 or so? A. Yes.

Q. You did use it then? A. Yes. No—in '51 you are referring to?

Q. Yes. A. No. I am talking about this incident. No.

Q. When had you used this heating pad before this incident of '58? A. I didn't use it.

Q. Never used it? A. No.

Q. Who used it around the house? A. The heating pad was bought, and I don't know who used it.

MR. MAZZUCHI: I think I have no further questions at this time.

THE DEPUTY COMMISSIONER: Mr. Cooney?

MR. COONEY: I have no questions.

THE DEPUTY COMMISSIONER: Mr. Intrater?

170 REDIRECT EXAMINATION

BY MR. INTRATER:

Q. What in the way of medication—how much have you spent for medication that was prescribed for you? A. How much?

Q. Yes. A. There was this muscle relaxant that was prescribed by Dr. Tidler, and I am not real sure whether it was \$5.95 or \$6.95, and at the Medical Arts Building where he had his office, I don't think the people had the stuff available, and I think I got it either at the Beltsville Drug Store or Peoples Drug Store. I don't know which. But I sent that in to USF&G.

Q. Has that been paid, do you know? A. No. I am not sure whether it's \$5.95 or \$6.95 or \$5.75, but it's something. But it was sent in and I never heard anything about it.

Q. Do you have any other bills? A. I can't remember.

MR. INTRATER: I think he has already testified that the heating pad was bought before, so I have nothing further.

EXAMINATION BY THE DEPUTY COMMISSIONER

BY THE DEPUTY COMMISSIONER:

Q. Mr. Dailey, you heard Dr. Weaver testify that
171 the last time he saw you was April 12, 1958. A. Yes.

Q. The next time he saw you was January, 1959.
A. Yes.

Q. Dr. Weaver was the first man who saw you after
this accident on March 28, 1958? A. Yes.

Q. Why didn't you return to Dr. Weaver if your back
hurt you after April 21, 1958? A. Well, I'll tell you, Mr.
Einbinder. When you are off from work, and you don't
draw any money, and I have a family to take care of, and
I figured I could get back on the job and do the best I
can. I was working with men that I worked with for quite
some time, and I did very little bending, and therefore I
needed the money for my family.

Q. Did you feel, Mr. Dailey, that after you last saw Dr.
Weaver on April 12, 1958, that you had recovered from
this injury which you had on March 28, 1958? A. I did not
feel like I recovered. I felt as though I would have to
get back to work and do the best I could so I could have
money for my family's expenses.

Q. The reason you didn't go back to Dr. Weaver after
April 12, 1958, was because you had to support your family?
A. I did, and I had taken and tried to make it as light on
myself as I could in bending and so forth.

Q. Is it your testimony that the work you per-
172 formed after April 21, 1958, was a little different
than the work you performed before you got hurt,
or on the day you got hurt, March 28, 1958? A. Well, I
would say yes, because part of the time I was foreman, and
most of the time I was working on the ceilings and it wasn't
too much of the bending work.

Q. In the job that you had as a metal lather working
for the Novinger Company on March 28, 1958, did you
perform your eight hours of work in bending— A. Not

all in bending, no, sir; part of it was bending and part standing.

Q. Did you do any more or any less bending after April 21, 1958, than you did before? A. Yes, I did.

Q. Less? A. Yes.

Q. Why did you do less? A. On account of my back giving me trouble.

Q. Why didn't you go to a doctor? A. I had taken and went to the doctor, and the time I was off—

Q. I mean, Mr. Dailey, on April 12, 1958, Dr. Weaver testified that he last saw you. Approximately eight months went by before you ever saw another Doctor? Why? A.

Well, I figured I needed the money for keeping my family, and I would try to make out the best I could.

Q. But after December 3, 1958, you first saw Dr. Tidler, on December 5, 1958, and Dr. Tidler swore here under oath that he saw you approximately 80 times from December 5, 1958, until August, 1959. A. Yes, he did.

Q. Was that because your back really hurt you then? A. Yes.

THE DEPUTY COMMISSIONER: I have no further questions of this witness.

MR. COONEY: I would like to ask a question.

THE DEPUTY COMMISSIONER: Proceed, Mr. Cooney.

CROSS-EXAMINATION

BY MR. COONEY:

Q. Mr. Dailey, on December 3rd when you had this pain—I will withdraw that.

From the time you went back to work on April 21, 1958, did you continually have pain all the time that you were working? A. I would be pretty good when I was standing, but when I start bending I will have pain, and in fact I have it right now.

Q. Is there any difference between the pain you have now and the pain you had at that time, in April of 1958?

A. Will you repeat that?

174 Q. Is there any difference in the type of pain that you have now? A. No.

Q. It's the same type of pain? A. Yes.

Q. Do you drive a car to work? A. Do I drive?

Q. Yes. A. Yes.

Q. Did you drive a car to work in 1958? A. In '58, yes.

Q. And you live on Ammendale Road in Beltsville? A. Yes.

THE DEPUTY COMMISSIONER: Maryland?

THE WITNESS: Yes.

BY MR. COONEY:

Q. And did riding in the car cause you any pain in your back? A. When you hit a chuck in the road or a rough spot or something, it hits that spot.

THE DEPUTY COMMISSIONER: How far do you have to drive to work every day?

THE WITNESS: Let me see, Mr. Einbinder. I worked part of the time at the Georgetown Hospital, in the new section, and from there I went out on Massachusetts Avenue
175 and to Casualty Hospital, which is a little closer to my place.

THE DEPUTY COMMISSIONER: Was that every day after April 21, 1958, until the—during the time you worked for Conroy and also later for Mitchell?

THE WITNESS: How is that again?

EXAMINATION BY THE DEPUTY COMMISSIONER

BY THE DEPUTY COMMISSIONER:

Q. From April 21, 1958, when you went back to work—
A. Oh, no, I was driving to the Senate Office Building.

Q. From your home how far is that, about 10 miles? A. I would say approximately 14 maybe.

Q. Each way? A. Yes.

Q. And you drove your car? A. Yes.

Q. Then after you left the project at the Senate Office

Building, where did you work for Conroy? A. The Charter House, which is a motel at New York Avenue and Bladensburg Road.

Q. How far is that from your home? A. Maybe 10 miles.

Q. Each way? A. Approximately.

Q. And you drove that by yourself? You drove
176 your car? A. Yes, there I did, but at the Senate Office Building I didn't drive my car all the time, I rode—I drove to Eastern Avenue and rode with another fellow.

Q. How long were you at the Charter House on Bladensburg Road? A. Let's see, that must have been from in June—

Q. 1958? A. 1958, I guess until somewhere around October.

Q. 1958? A. Yes.

Q. And you drove your car there every day? A. Yes.

Q. About ten miles each way? A. Approximately 10 miles.

Q. Then sometime in October you went to work for Mitchell? A. Yes, in Georgetown Hospital.

Q. And you drove your car from home, Beltsville, Maryland, to Georgetown Hospital? A. Yes.

Q. How long was that before December 3rd, about five or six weeks? A. Let's see. I would say about five or six weeks, because I was at Casualty Hospital just a short time.

Q. Then after June 30, 1959—after June 30, 1959,
177 Mr. Dailey, did you drive your car also? A. June 30, 1959?

Q. I believe your claim is for temporary total disability from December 5, 1958, to June 30, 1959, and then from June 30, 1959, your attorney has made a claim for permanent partial disability, and he states in the claim that you went back to work— A. For a period of time when I was going to Dr. Tidler, which was from December 3 until—1958—until June, 1959, 80 visits or whatever it was, dur-

ing that time my wife had to take me, I couldn't drive the car.

Q. I am talking about after you went back to work on June 29th, did you drive your own car? A. Yes, I drove my car part of the time, and part of the time I rode with another fellow.

Q. And have you driven up until the present time? A. Yes.

Q. Can you drive your car yourself? A. Yes.

Q. You require no help? A. That's right.

Q. Do you wear a garment or appliance for your back, a back support? A. No, I do not because I have tried to wear one and the pain was so terrific that I could not stand it.

178 Q. When was the last time you received a diathermy treatment or physiotherapy treatment from a physician? A. Well, the dates Dr. Tidler has given. He said I was——

Q. August 17, 1959, was that the last time? A. Yes.

Q. That is what he testified. A. He said I was to the point where I was about as good as I was going to get.

Q. And I believe you testified earlier that your wages now exceed the wages you were earning when you were injured, now that you are a foreman? A. Yes. But during that time I was a foreman, too.

THE DEPUTY COMMISSIONER: Proceed, Mr. Cooney.

CROSS-EXAMINATION (Resumed)

BY MR. COONEY:

Q. Mr. Dailey, when you were working at Georgetown Hospital, what kind of work did you do up there? A. What kind?

Q. Yes. A. Lathing.

Q. The same thing that you were doing at Casualty Hospital? A. Same thing.

Q. Same type of work? A. Yes.

179 Q. And you were just walking along the floor and felt a pain in your back? A. That's right.

Q. And you never notified the foreman or anybody at Mitchell of any injury— A. No injury, I just told them of the pain.

THE DEPUTY COMMISSIONER: You told them what? You told them what, Mr. Dailey?

THE WITNESS: Of the pain that was in my back, that it had gotten so severe that I couldn't hardly make it, and I told them, I don't think I will be able to make it.

THE DEPUTY COMMISSIONER: Did you tell him it was due to the job?

THE WITNESS: No, because I had pain all along.

THE DEPUTY COMMISSIONER: Did you ever request the Mitchell Company to give you any treatment?

THE WITNESS: No, I did not.

THE DEPUTY COMMISSIONER: You may be excused.

(Witness excused.)

MR. INTRATER: I would like to call Mr. Haack.

Thereupon,

William F. Haack

was called as a witness on behalf of the Claimant and, having been first duly sworn by The Deputy Commissioner, was examined and testified as follows:

180 THE DEPUTY COMMISSIONER: Please give the reporter your full name and address.

THE WITNESS: William F. Haack, 3401 Chatham Road, Hyattsville, Maryland.

THE DEPUTY COMMISSIONER: All right, Mr. Intrater.

DIRECT EXAMINATION

BY MR. INTRATER:

Q. Mr. Haack, what do you do for a living? A. I am a metal lather.

Q. And how long have you been engaged in that occupation? A. Oh, since '21.

Q. How long have you known Mr. Wilburt Dailey? A. Roughly, I would say, about 14 years, 14 or 15; offhand I couldn't give you the exact time.

Q. Do you recall whereabouts you were working on or about December 3, 1958? A. 1958? That would be Casualty Hospital.

Q. And for whom were you working? A. I was working for the L. E. Mitchell Company.

Q. What was your— A. I was foreman on the job.

Q. Now, do you recall anything specifically happening with regard to Wilburt Dailey on December 3, 1958? A.

Do I have permission to say?

181 Q. Yes. A. Why he came on the job and talked to me about getting a job, and I told him I was willing to put him on, and he told me about having a little back trouble on the job that he had just came from, and he said that he didn't know whether he could, you know, could keep up with the program, and I told him, well, I said I was going to try him and let him have his opportunity to work and see how he could stand it.

So he worked quite—quite regular. I put him on some work that wasn't up on the scaffold, and jumping up and down on horses like normally the lathers do, and I put him on work that he could work right off of the floor, and of course it did consist of bending over and picking up things here and there, and bending down to nail things on the walls, and then somewhere around lunch time he talked to me and he said he wasn't doing—he was doing so good, he was getting pretty sore and didn't know whether he could last the day out or not.

Q. This was on what date? A. I couldn't give you the date. The time he was working there, that is the time he took off that day. See, if you will let me finish, I will give you the idea.

So he ate his lunch, and of course we naturally went back to work, and not too long after that he came up to me

and he told me, he said, Red, I can't take it no longer.
 182 He said, I have got to quit. So I got one of the
 boys to gather his tools up and take them down-
 stairs for him.

Now that is about all I can say in regard to that.

Q. Approximately how long had he been working there
 at the time this occurred, that he couldn't continue to work
 any further? A. Well, that was the one day in particular
 —that is about all I can recollect with regard to the com-
 plaint. That is all I can say in regard to that.

Q. You do recall when he first came on the job that he
 did tell you about his back trouble? A. Yes, yes, defi-
 nitely.

Q. Do you recall whether at any time between when he
 came on the job and the day he finally said he couldn't
 work any more, do you recall whether during that period
 of time he let you know whether his back was bothering
 him? A. Definitely.

Q. Was that something that was constantly with him?
 A. Because I told him, if you can, stick it out—because
 I do know that the man is a good mechanic, and at that
 time I needed a good mechanic, and that is all there was
 to it.

Q. Now this was— A. But I wish to say this one par-
 ticular thing, I knew nothing about his prior trouble.
 183 Q. Just how it happened you mean? A. That's
 right.

Q. You just knew he had some prior trouble? A. I knew
 he had something wrong, but I knew nothing about the
 prior program.

Q. Now you stated that you have known Mr. Dailey for
 around 14 years? A. That is right.

Q. That would be 14 years from now, so back in '58 you
 had known him around three years less, so you had known
 him around 11 years? A. We worked together on the same
 program for years.

Q. During any of these times in the past that you had worked with him, did he ever indicate that he had any back trouble? A. No. In fact, he was the one that did all the heavy work. In fact, he helped me build some part of my house out there.

Q. Now, prior to leaving he did report to you, however, that his back was such that he had to quit, that he couldn't take it any more? A. He told me definitely, he says, I can't take it any longer, I have got to quit.

Q. Did you ever report this to the Mitchell Company? A. At that particular time I had no inkling that Mitchell Company would be involved, until a telephone call 184 came to me from—oh, I can't think of the name of the party, but they called me in regard to the insurance, and I told them at that time that Mitchell and Company was not to be involved in that, that it didn't belong in Mitchell Company's program, that it was not through their department. And then not too long after that—this is where I made the mistake—not too long after that somebody—some of these companies that had something to do with it, they called me and asked me why I didn't have this program put on our welfare program—I happen to be in charge of welfare for the lathers—and I told him that it did not belong with the lathers' program, that it would have to be a compensation program, that it did not come from our welfare. But I failed to remember that one man's name that called me. Now who it was I don't know, but I know they had something to do with insurance.

MR. INTRATER: I have no further questions.

THE DEPUTY COMMISSIONER: Mr. Cooney?

MR. COONEY: I have no questions.

THE DEPUTY COMMISSIONER: Mr. Mazzuchi?

CROSS-EXAMINATION

BY MR. MAZZUCHI:

Q. Mr. Haack, do you know how long this man worked for you over there? A. Oh, the exact time I couldn't say

185 exactly. I would have to go probably back to the records, or go to Mitchell and Company to verify that, but I couldn't tell you exactly.

Q. Give us an estimate. A. Well, it would have to be less than a week, I think, something in that neighborhood.

Q. He worked for you over there on that job less than a week? A. At Casualty Hospital, that's right.

MR. MAZZUCHI: I have no further questions.

CROSS-EXAMINATION

By MR. COONEY:

Q. You don't know whether or not the work over at Georgetown— A. I know nothing about that program.

Q. Mitchell had the job at Georgetown too, didn't he? A. I don't know.

Q. You are talking about the work on the job that you were foreman on? A. That is right; that is for me direct.

THE DEPUTY COMMISSIONER: Mr. Haack, when Mr. Dailey told you that he couldn't take it any more, did he tell you that his complaints were due to the work, or that he had an injury?

THE WITNESS: No, he told me he wrenched his back prior to going to work—

186 THE DEPUTY COMMISSIONER: But on this day in December, 1958, when he took off, did he report to you as his foreman that he suffered an injury while working for Mitchell, or that the consequences of his work produced an irritation of his back?

THE WITNESS: Just produced irritation of his back from a previous program he spoke about.

THE DEPUTY COMMISSIONER: He reported that his work caused his back to become worse?

THE WITNESS: That's right.

MR. COONEY: Mr. Commissioner, I object to that. I don't think that is what he testified to. He didn't testify to that. He didn't testify, I don't think, to those facts. I think if you will refer back to his testimony—

MR. INTRATER: He just did in answer to Mr. Einbinder's question.

MR. COONEY: Mr. Einbinder testified to that.

THE WITNESS: Is it all right if I ask a question? I don't know what the argument is all about.

MR. COONEY: I think it's misleading to have that in the record, and I would like to have it cleared up.

THE DEPUTY COMMISSIONER: Mr. Haack, did Mr. Dailey tell you that he sustained an injury at work?

THE WITNESS: Not on my job, this was from a previous program that he was talking about.

THE DEPUTY COMMISSIONER: Any further questions
187 of this witness?

REDIRECT EXAMINATION

BY MR. INTRATER:

Q. Well, with regard to this back problem that he had, isn't it a fact that he had told you that he had an injury before? A. Yes, that is right.

Q. And his back was hurt, and he would stick it out as long as he could, and finally he came up and told you that with the work he was doing, that his back was getting worse and worse and he couldn't take it any more? A. That is correct.

THE DEPUTY COMMISSIONER: When did he tell you that the work he was doing, he couldn't take it any more?

THE WITNESS: Right after lunch.

THE DEPUTY COMMISSIONER: I want to give you the benefit of the testimony of Mr. Dailey. Mr. Dailey testified before me under oath that he never reported any injury, or that the consequences of his work at Mitchell Company produced a strain of his back.

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188 THE WITNESS: I do know that he had trouble prior to coming to work for me, and he told me then at that particular time that he didn't know whether he could produce enough to satisfy the program.

THE DEPUTY COMMISSIONER: Yes.

THE WITNESS: And he went to work, and it irritated him so bad that he said, I have to quit.

189 THE DEPUTY COMMISSIONER: What irritated him?

THE WITNESS: The work; I mean, in bending up and down. What he would have to do would be bend down to the floor and pick up, and bend back up again and nail things on the wall, and it was irritating his back. Now he did not say to me that it was because of anything at that particular fault of that particular time.

THE DEPUTY COMMISSIONER: All right.

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190 RECROSS-EXAMINATION

By MR. COONEY:

Q. Did I understand you to say, Mr. Haack, that on December 3rd, the day that Mr. Dailey left work over there because his back pained him, that he told you that it was because he was bending over and stooping over and picking things up that caused the pain in his back? A. That is correct.

Q. He told you that? A. Well, I don't know as he said it in those words exactly.

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212

Dr. William R. Stecker

was called as a witness for and on behalf of Respondents Novinger Company, Inc., and United States Fidelity and Guaranty Company and, having been first duly sworn by the Deputy Commissioner, was examined and testified as follows:

213 THE DEPUTY COMMISSIONER: Please give the reporter your full name and address.

THE WITNESS: William R. Stecker, 11506 Michile Court, Silver Spring, Maryland.

THE DEPUTY COMMISSIONER: All right, Mr. Mazzuchi.

DIRECT EXAMINATION

BY MR. MAZZUCHI:

Q. Dr. Stecker, have you a license to practice medicine in Maryland? A. I do.

Q. And how long have you been so engaged? A. In Maryland you mean?

Q. Yes. A. Since 1950.

Q. Doctor, where did you take your degree? A. Jefferson Medical College, Philadelphia.

Q. And are you engaged in a specialty? A. I am.

Q. And what is that? A. Radiology.

Q. And in the course of your career, have you had any staff appointments? A. Sure.

Q. What are your staff appointments? A. You mean from my incipency?

214 Q. No, no. A. I am the radiologist at Prince Georges Hospital.

Q. How long have you been the radiologist there? A. Just 11 years now.

THE DEPUTY COMMISSIONER: Are there any questions on the qualifications of Dr. Stecker as a roentgenologist, Mr. Intrater?

MR. INTRATER: None at all. I would have stipulated.

THE DEPUTY COMMISSIONER: All right, Mr. Mazzuchi.

BY MR. MAZZUCHI:

Q. Dr. Stecker, in the course of your practice did you have occasion to take and study X-rays pertaining to the claimant in this case, Wilburt Dailey? A. I did.

Q. When did you first take an X-ray of him? A. The first X-ray taken is 4-5-58.

Q. And what portion of his body did you X-ray? A. Examination of the lumbosacral spine.

Q. And what did that disclose? A. I will read my report.

Examination of the lumbosacral spine discloses marked straightening of the lumbar curve. There is definite and marked narrowing of the disc at the level of 3-4 L which strongly resembles an incomplete fusion, namely, a so-called congenital block.

215 Vertebra: There is no evidence of spondylolisthesis. There is slight wedging effect of T-12 which may be due to positional strain or possibly an osteochondritis. There is scoliosis of the lumbar spine with convexity directed to the left. In addition there is fusion of the third and fourth lumbar spinous processes which is rather conclusive that this is a block congenital deformity at this level.

Q. Doctor, was there any evidence in that X-ray of fracture in the area X-rayed? A. No, or I would have so reported.

Q. Did you have occasion to re-X-ray this claimant at another date? A. I did. The next examination on our record is 12-16-58.

Q. And what did that disclose? A. I will read that again.

Examination of the lumbosacral spine disclosed a so-called incomplete block fusion vertebra at the level of 3-4 L. There was no evidence of fracture in this area. The lumbar-sacral disc is of normal description. It is now seen there there is a suspicious radiolucent line on the left 4th lumbar transverse process. I strongly recommend a spot film of this region to make certain that this is a fracture and not an artefact. In reviewing the original film, this was not seen at that time.

216 Do you want me to go on?

Q. Please do. A. Then apparently 12-25-58, the patient came in for his spot film.

Spot film of the left 4th lumbar transverse process discloses a fracture through the tip of the 4th lumbar transverse process with good position of the fracture.

Do you want me to continue?

Q. Please do? A. The next examination was 2-19-59 and this is the diagnosis:

Examination of the lumbosacral spine discloses no change in the position of the fractured transverse process of the lumbar vertebra left side and there is very slight callous formation. There is scoliosis of the lumbar spine with convexity directed to the left. No further compression fracture of the vertebral body is seen.

Then we have the last one which was done on 3-3-59, lumbar spine. Incidentally, this is my associate's report. This is the only one of the group he did.

Fracture of the left transverse process of L-4 remains in good position with some new bone formation although the fracture line is still visible.

That's all we have.

Q. Now Doctor, in your capacity as an expert
217 radiologist, can you tell us whether the fracture viewed by you in this man's spine on December 16 and again on December 25 and thereafter was of recent or old origin? A. Well, it depends how recent and how old. That is the old qualifying thing. But from an X-ray standpoint, if we see a fine sharp line which when we can go back and have a basis where most before it was not seen, then you assume it was fractured at that time or in the very recent past.

Q. In other words, what you are saying, Doctor, I want to understand you, that when you examined, when you X-rayed this man in April of '58, there was no fracture line? A. That's right and since we saw this naturally having had an X-ray approximately eight months prior, I even put a note here, we reviewed the original film and this was not seen at that time.

Q. Now, would you say then that this fracture occurred some time between April 8 and December 16? A. Well, obviously.

Q. Doctor, why do you come to that conclusion? A. Well, I tell you why I came to that conclusion in subsequent

examinations, because we did a spot film and confirmed it so it was not an artefact and then two months subsequent to confirmation, we see a haziness of the fracture line which attests to some callous formation. Then my associate, three months later, roughly established in 218 our view that there was a fracture of the left 4th lumbar transverse process, he states, with some new bone formation.

Q. Now, was there any callous formation between the time of your X-ray in December 16, 1958 and December 25, 1958? A. No.

Q. Doctor, assuming the following statement of fact: The claimant in this case on March 28, 1958, fell from a scaffold— A. (Interposing) Pardon me, before that first examination. I just want to get my dates right.

Q. (Continuing) —fell from a scaffold and injured his back as a result of which he lost some time from work but ultimately returned to work and that one day while working on or about the 3rd day of December, 1958— A. (Interposing) The next examination.

Q. (Continuing) —and engaging in some heavy work, he straightened up and felt a sharp pain in the area of his back.

Which of these incidents would you say was responsible for this fracture that you found in his back?

MR. COONEY: I object to the question. I object to the form of the question. It is not a proper hypothetical question. It does not contain the proper facts, does not explain what the injuries were in March of 1958 and furthermore,

I don't think that the Doctor is qualified to give an 219 answer to that question. He is an X-ray specialist.

THE DEPUTY COMMISSIONER: Overruled. Any question propounded to a doctor will have to be substantiated by the evidence in the record.

You may answer, Doctor.

THE WITNESS: I didn't get—

MR. COONEY: I don't get that.

THE WITNESS: That was sort of a long question.

Are you asking whether I think that this fracture of the transverse process would be due to an injury eight months prior or a few days or weeks prior?

BY MR. MAZZUCHI:

Q. Do you remember the X-ray in December? A. Being an X-ray man and having not seen the fracture in the original, I assume it must have been done prior to 12-16-58.

Q. And as far as you know, Doctor, what caused it after April and before December 16, 1958 is something— A. Well, sometimes when you answer, you get things more involved. I'll try not to. This may help you, this answer.

It is true that fractures of the transverse process of the lumbar vertebra not uncommonly follow muscular pull. For instances, we see it occasionally in golfers whereas a fall from a height landing on the feet is more likely to compress the vertebral bodies.

Does that elucidate anything for you?

220 Q. All right. A. It is a difficult question to answer.

MR. MAZZUCHI: I have no further questions.

THE DEPUTY COMMISSIONER: Mr. Cooney?

CROSS-EXAMINATION

BY MR. COONEY:

Q. Doctor, those reports that you were reading into the record, were they reports made by you? A. All except the very last one. I so stipulated. I said the 3-59 was done by Dr. Eby, my associate.

Q. And the X-ray studies prior to the last one were made by you? A. Yes, my name was on all of them. I did them all.

Q. Doctor, assuming that on December 3, thirteen days prior to your first finding— A. (Interposing) You mean '58?

Q. (Continuing) —suspicion of a fracture. A. Wait a minute. December 3, that is the second examination. Yes, go ahead.

Q. December 16? A. 16th, we made the examination.

Q. Assuming that on December 3, '58, that Mr. Dailey was simply walking along and felt a pain in his back, would you say that that caused a fracture? A. Well, if
221 as you say, he was just walking along, I don't know how to answer that. It has happened from coughing, it has happened from a lot of things but whether you say this particular man walking along—how do I know that? I wasn't there. Does that answer it or does it not answer it?

Q. Yes.

Assuming, Doctor, that this man was injured in April of 1958? A. Yes, first examination.

Q. The first examination.

Would it be possible that he had a fracture at that time which did not show up? A. Is it possible?

Q. Yes. A. Oh, I guess it is possible very remotely so.

Q. Isn't it, Doctor, not remotely so? Isn't it a very common thing that many times fractures don't show up on the taking of one X-ray? A. I'll answer two ways, it does happen but it is not common.

Q. How many pictures did you take? A. I don't have them here but we have routine in lumbar-sacral spine. We take anterior—

Q. Wait a minute. How many X-rays did you take on April 5, 1958? A. I assume since they are not here
222 that it is the standard procedure which is anterior, lateral and a spot film of the lumbar-sacral juncture which is standard procedure.

Q. Doesn't your record and your report show that? A. No, I don't write every number of times you put on the diagnosis.

Q. Isn't it important to know? A. No, it is not important.

Q. Please wait until I finish. A. I am sorry.

Q. Isn't it important to know whether you took the side view, the front view? A. I just got through telling you that, front, side lateral, a 10 by 12 spot film laterally of the lumbarsacral juncture.

Q. In other words, you always do that? A. That's routine in our hospital.

THE DEPUTY COMMISSIONER: Doctor, the injury to which Mr. Cooney referred occurred on March 28, 1958, not in April.

THE WITNESS: Yes, that was on the first examination. That's why I always have to get these things straightened out.

MR. COONEY: I have no further questions.

THE DEPUTY COMMISSIONER: Mr. Intrater?

MR. INTRATER: Yes.

223 CROSS-EXAMINATION

BY MR. INTRATER:

Q. Doctor, you stated in your report of December 16, it is now seen that there is a suspicious radiolucent line? A. Correct.

Q. Is there any significance to your terminology, it is now seen there is a suspicious radiolucent line? A. You mean this emphasis on "now," as you make it?

Q. I wouldn't emphasize it. It is now seen that there is a suspicious radiolucent line. A. Well, see,—

Q. I didn't inflect at all that time. Is there any significance to your use of the word, "now?" A. Sure. We are saying it now on this thing that's why we added on here in reviewing the original film, this was not seen at that time. See, a lot of things are artefacts, they are either a posoas margin line; they can be a slight streak of gas, an artefact from stain of a film in development so when you have anything like that, it is important to make sure and therefore, you go back to your original film. After all, you may not have seen something in the original.

So, you then make a point of saying it was seen and then you recommend further studies that were done.

Q. Now, you said that ordinarily if such a suspicious line as this will actually be the same type of fracture there at the time of the taking of the first X-ray that such a suspicious line probably would have shown up at that time? A. That's a fair statement I'd say.

Q. Now, Doctor, isn't it a fact that X-rays are not so accurate and that in fact even at looking at the same X-rays, different experts can vary on their opinion? A. That's why we are here.

Q. Is there any question in your mind but that there was as of the date of your taking the X-ray on December 16 and thereafter on December 25, is there any doubt in your mind but that there was a fracture there in the 4th lumbar transverse processes? A. Well, as stated here, it was questionable 12-16 and nine days later when the man returned—

Q. Doctor, I don't want you to read your report.

You took an X-ray on December 16, 1958? A. That's right.

Q. You subsequently took an X-ray on December 25— A. Right.

Q. (Continuing) —1958 and from these X-rays and subsequent X-rays that you have taken and have had taken, is there any question in your mind but that there was a fracture there on December 16, 1958? A. Right. I say this was a fracture because I saw callous formation and my associate saw new bone formation. That is the only way you get that.

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233

Christine Owen Dailey

was called as a witness for and on behalf of the claimant and, having been then and there duly sworn by the Deputy Commissioner, assumed the witness stand and, upon examination, testified as follows:

THE DEPUTY COMMISSIONER: Please give the reporter your full name and address, Mrs. Dailey?

THE WITNESS: Christine Owen Dailey, 4211 Ammendale Road, Hyattsville, Maryland.

THE DEPUTY COMMISSIONER: All right, Mr. Intrater.

234 **DIRECT EXAMINATION**

BY MR. INTRATER:

Q. Mrs. Dailey, you are married to Wilburt Dailey, the claimant in this case? **A.** Yes.

Q. Now,—

THE DEPUTY COMMISSIONER: Off the record.

(Discussion off the record.)

THE DEPUTY COMMISSIONER: On the record.

BY MR. INTRATER:

Q. How long have you and Wilburt Dailey been married?

A. Ten years.

Q. Now Mrs. Dailey, do you recall the occasion in March of 1958 when Wilburt sustained an injury? **A.** The first injury?

Q. Yes, that was in March of 1958? **A.** Yes.

Q. Had Wilburt prior to that time every had any complaints with regard to his back? **A.** No.

Q. Do you know the type of work that he was doing prior to that time? **A.** Very heavy work and he was a terrific man. He could do just about anything and everything.

Q. Now, aside from his working on jobs, on location at jobs, did Wilburt do any kind of heavy work around the house that you yourself could see? **A.** Oh, yes.

Q. What type of work would he do? A. He'd do everything and he could do work that he can't do now. He would fix, take care of the house and the cars and all that heavy work.

Q. When you say, take care of the house, you mean actually construction work about the house? A. Yes, he built a lovely room for me, he built it himself. He did all that and go help people build theirs and he had a great deal of strength and energy and he was very good.

Q. Now, you say that also he worked on automobiles? You mean mechanical work on the cars? A. Yes, we never had to worry.

Q. Would he jack up the cars, change tires as well? A. Yes, he'd fix the cars.

Q. Actually do what a mechanic would? A. Yes, he actually would. He'd fix them and he'd go ahead and do it.

Q. Would you describe what his condition has been since the accident of March, 1958? That is the first accident, as you referred to. A. Well, Wilburt is not the same because he cannot do heavy work like he was able to do on account of his back.

236 MR. MAZZUCHI: I object to that answer. I believe that states a conclusion.

THE DEPUTY COMMISSIONER: Overruled.

THE WITNESS: He doesn't dare fix the cars any more because it is too heavy and the house, he cannot take care of the house like he used to be able to do. We either have to have someone come in or I have to do it.

BY MR. INTRATER:

Q. Now, aside from the effect on his working ability, have you yourself observed any evidence of pain in Wilburt since that time? A. Very much.

Q. And would you describe that, please? A. Well, Wilburt at night, he will be sound asleep and he will get quivering. He quivers so bad that it wakes me out of

a deep sleep and it is just like his left side is just shaking. It is terrible and I have asked what it was and they seem to think it is a muscular spasm, and it is so bad that it actually wakes me up.

Q. You say, "wakes." Is it your testimony that this continues to the present time, that this still happens? A. It is not as bad now. Right after March it was.

Q. When you say, "March," do you mean March of 1958? A. Yes.

237 Q. Go ahead. A. And after that, he'd be asleep and this would start and it was so vivid that it just would shake everything, the bed and everything. Of course, I'd wake up.

Q. Now, you have said that this occurred right after March. Would you say that it occurred before December of 1958, this shaking? A. Wait a minute, I don't want to get confused.

Q. You recall, as you have termed it, the first accident was March of 1958? A. Yes.

Q. Subsequently there was another occasion when Wilburt felt further pain. That was in December. In other words, almost nine months later. Now, I am asking you with regard to this shaking, this muscular shaking in bed, did that happen, did you notice that between the first and the second? A. Yes.

Q. So that happened before December? A. And after too.

Q. I am asking you when it first occurred. It first occurred before December of 1958? A. Yes.

Q. And has continued since that time up until the present time? A. Yes, that's right.

Q. Now, would you describe the frequency and
238 severity of these incidents in 1958 after March? A.

Well, at that time but as of right now, it is not as bad as it was then.

Q. Describe first how it was and we will bring it up to date. A. First it was so bad, you know, his back was

bothering him and I used to put heat on him and he'd get in the hot water. When he'd get in bed, he would go to sleep. I don't know whether it was the medicine or what but he'd go to sleep and then this terrible—it was to me a quivering and a shaking and it was just like his leg would go up and down and it was so bad, it would wake me up.

Q. How often did that occur? A. Well, there for a while quite often, Mr. Intrater.

Q. How often would you say it occurred? A. I'd say almost five nights. It wouldn't be every night.

Q. When you say, "five nights," you mean per week? A. That's right.

Q. You wouldn't say it happened every night during the week but the majority of time? A. The majority of the time I think Wilburt was in a great deal of pain and maybe the medicine put him to sleep and then this spasm started.

THE DEPUTY COMMISSIONER: You mean after March 28, 1958 until the present?

THE WITNESS: Yes, sir.

THE DEPUTY COMMISSIONER: He was in that same type of pain from March 28, 1958 until December 3, 1958 when he was working for Mitchell Company?

THE WITNESS: But not as bad, Mr. Einbinder. I mean it seems like now it is easing off from Wilburt some. But when Wilburt gets extremely tired now and sometimes he will sit down in a chair and can hardly get up and when he goes into a deep sleep, he will start that, but it isn't as bad.

THE DEPUTY COMMISSIONER: Did that occur after he returned to work for Novinger Company on April 21, 1958? Did that occur, these things you were talking about—

He was injured on March 28, 1958 when he fell about 18 inches off of a scaffold and while pulling some channel iron, sustained a strain of the back and he was off work from March 28 until April 20, 1958 and returned to work for Novinger Company, the first company, April 21, 1958.

Now, after he returned to work, Mrs. Dailey, April 21, 1958 until he went to work some time in October or November of 1958 for the Mitchell Company where he was allegedly injured on December 3, 1958 while bending and stooping and nailing lathes to the wall, did he have this same type of pain?

THE WITNESS: Yes, sir.

THE DEPUTY COMMISSIONER: Why didn't he go to a doctor?

240 THE WITNESS: Well, Wilburt was under the care of a doctor. No doctor seems to know what they are talking about.

THE DEPUTY COMMISSIONER: What doctor?

THE WITNESS: He was under the care of Dr. Weaver.

THE DEPUTY COMMISSIONER: During the time he went back to work for Novinger on April 21, 1958?

THE WITNESS: April 21, 1958.

THE DEPUTY COMMISSIONER: The testimony in my record, Mrs. Dailey, is that Dr. Weaver testified that he saw your husband from April 1, 1958 every day until April 12, 1958, that Mr. Dailey did not return to his office after April 12, 1958; that some time in May of 1958, someone called Dr. Weaver and told Dr. Weaver that Mr. Dailey had returned to work and in answer to questions put to Dr. Weaver by Mr. Mazzuchi who represents the employer Novinger and the United States Fidelity and Guaranty Company, Dr. Weaver testified that he submitted a report to this office indicating that Mr. Dailey was able to go back to work on April 15, 1958, and that he later amended it.

He was able to go back to work on April 21, 1958 and he did not see Mr. Dailey from April 12, 1958 until January 31, 1959.

Now, my question to you, Mrs. Dailey, is did Mr. Dailey have these muscular pains you have described from the time he last saw Dr. Weaver from April 12, 1958
241 until December 5th, or 8th, 1958, when he first saw Dr. Tidler? Did he have those same pains?

THE WITNESS: He had them but not as severe. But Wilburt is no sissy and he should not have went back to work the first time but we had trouble getting the money out of the insurance company then and we needed the money. I just had a new infant and I had a little baby and five children in school and it was terrible, and Wilburt went back to work when he should not have went the first time. And if I had been able to go to work, I would have went but I couldn't go to work with a new infant and I had just had a major operation.

THE DEPUTY COMMISSIONER: Was it your testimony Mr. Dailey was or was not under the supervision of a physician for the treatment of his back from April 21, 1958 until December 3, 1958? Was he or was he not under the care of a doctor?

THE WITNESS: You mean constant care?

THE DEPUTY COMMISSIONER: At any time did he see a doctor?

THE WITNESS: As far as I know, I don't believe so.

THE DEPUTY COMMISSIONER: All right, Mr. Intrater.

BY MR. INTRATER:

Q. Now, on these occasions of these periods of shaking or quivering, when they first occurred, for how long would each episode last? A. Well, not too long, maybe 15 or 20 minutes.

242 Q. Now, would they occur more than once a night or was it just usually a single occurrence? A. Most of the time it would be once and then sometimes it was toward morning. If it would start—see, Wilburt was under a drug and I think that you know, it would start and I would try to wake him up but toward morning, he would sort of get relief and maybe go back to sleep.

Q. Now, you have testified that this was quite severe or quite frequent at first, probably five out of seven nights a week. Now, how did this progress as time went on? Did they become less frequent? A. Yes.

Q. And have they always continued to be less frequent or was there any period of time when they would become more frequent again? A. Well, it seemed to me, Dr. Tidler was treating Wilburt and it seemed at that time——

THE DEPUTY COMMISSIONER: What time are you talking about?

THE WITNESS: I get confused.

THE DEPUTY COMMISSIONER: Dr. Tidler, I don't think, saw Mr. Dailey either until December 5, 1958, and I believe he testified the first treatment was December 8, 1958.

THE WITNESS: Well, these spasms—Wilburt—up to the time he was injured, he never had them. And I don't
243 quite understand what you want to know, Mr. Einbinder.

BY MR. INTRATER:

Q. If we could make, if you could visualize a graph with a curve on it showing the number of these attacks and the frequency of the attacks and say that a high level on the curve would be a lot of attacks or frequent attacks, and then as they get lower, they'd be less frequent. Is the curve you are testifying to, has it gone steadily down or was there any time when it came up and went down and came down again? Has it been steadily getting less frequent since the original accident? A. Yes. At first it was very severe and as of right now, he doesn't have these attacks like he did. Does that——

Q. Approximately how frequent does he get these attacks at the present time? A. Not too often.

Q. Can you recall the last attack that he had? A. I do know this with Wilburt, if Wilburt has been on the go too much or tried to do too much, it seems like this will come on him. And just when the last one happened, I mean as far as telling you just down to the day, I couldn't do it.

Q. So you would base it now on the amount of physical exertion he does? A. That's right. When he over-works

or does anything heavy, I notice it in every way with Wilburt.

Q. Now, did Wilburt at any time prior to the
244 accident back in March of 1958 to your recollection
ever suffer from any of these spasms? A. No, he
never did as far as I know and we have been very close.
He never has, no.

MR. INTRATER: I have nothing further.

THE DEPUTY COMMISSIONER: Mr. Mazzuchi?

MR. MAZZUCHI: I have no questions.

THE DEPUTY COMMISSIONER: Mr. Cooney?

MR. COONEY: I have no questions.

THE DEPUTY COMMISSIONER: You may be excused, Mrs.
Dailey.

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Dr. James Peter Murphy

was called as a witness for and on behalf of the respond-
ents Novinger Company, Inc., and United States
245 Fidelity and Guaranty Company and, having been
then and there duly sworn by the Deputy Commis-
sioner, assumed the witness stand and, upon examination,
testified as follows:

THE DEPUTY COMMISSIONER: Please give the reporter
your full name and address.

THE WITNESS: James Peter Murphy, 1904 R Street, in
the District.

THE DEPUTY COMMISSIONER: Any questions on the quali-
fications of Dr. Murphy, Mr. Cooney?

MR. COONEY: No.

THE DEPUTY COMMISSIONER: Let the record show that
Dr. Murphy has appeared before me in many formal hear-
ings and is known to me as a specialist in neurosurgery.

All right, Mr. Mazzuchi.

DIRECT EXAMINATION

BY MR. MAZZUCHI:

Q. Dr. Murphy, in the course of your practice, did you have occasion to examine Wilburt Dailey, the claimant here? A. Yes, I did on April 23, 1959.

Q. Did you take a history from him? A. Yes, sir.

Q. What was the history? A. That first he had strained his back when a scaffold threw him to the ground,—or a scaffold can't throw anybody—when he fell from a
246 scaffold or in some way left the scaffold and landed on the ground on March 28, 1958.

He was seen and treated by Dr. Frank Weaver thereafter with diathermy and medication.

On December 3, 1958, after he had been returned to work while he was nailing on a wall, back pain recurred.

Q. Did he have any complaints, sir? A. At the time I saw him he complained of pain in the middle and left side of the back and across the low back. He said that he was not working at the time I examined him which was April 23, 1959; that he had done no work since December 3, 1958. Dr. Weaver and Dr. Tidler were also treating him at that time.

Q. Doctor, did you have occasion to examine any X-rays taken of this claimant? A. Yes, sir, I did later on.

On May 15, 1959, there were four sets of X-rays which were taken from April, '58 through December of '58 to March of '59. I viewed the films. As a matter of fact, I went over them with Dr. Eby who is in Dr. Stecker's department and the findings indicated that there was a congenital semi-fusion of the 3rd and 4th lumbar vertebra, that there was fracture at the tip of the transverse process of the 1st lumbar vertebra.

Now, as to in what set of films the fracture of the tip of the transverse process was present, this wasn't indicated in my report but they were not present in the
247 film taken in March, or rather in April, but it was present in the film made in December.

MR. COONEY: You mean April, '58?

THE WITNESS: Yes, sir, and December, '58.

BY MR. MAZZUCHI:

Q. Now Doctor, did you do an examination of this patient? A. On April 23, 1959?

Q. Yes. A. Straight leg raising was not possible because the patient resisted it severely on both sides indicating among other things, great strength in both legs. Each calf measured 15 inches in circumference. There was no evidence of shrinkage of either leg.

The 4th lumbar spinous process, that is, the one in the middle, was said to be exquisitely sensitive to pressure. All back motion was resisted so it was not possible to test the back bending. Otherwise, examination of the cranial nerves, reflexes, sensation, coordination and motor power was within normal limits.

Q. Did you form any impression or make any diagnosis from your examination? A. It was my impression the patient was exaggerating exceedingly the degree of disability.

I could find no objective evidences of any persistent disability. I must say though, as I indicated, straight
248 leg raising and forward bending, both of which are the most significant parts of the examination of the function of the back were resisted so strongly that they could not be tested.

The only finding that I would feel was definitely indicative of any persistent physical manifestation of traumatic, that is due to injury, disease was the X-ray showing the fracture of this tip of the transverse process.

Q. Did you feel that this claimant was at all disabled at that time, Doctor? A. Within the limits of my examination I felt he was not.

Q. Did you know that this man was a metal lather? A. Yes, sir.

Q. And do you know what metal lathers do? A. Well, I

have an idea to a certain extent what they do but I am sure I could not describe his day.

Q. They work on construction work. A. Yes, sir.

Q. Doctor, what would you say would be the disabling significance of a fracture of the transverse process such as the claimant had here? A. In and of itself?

Q. Yes. A. After approximately six weeks, none. Most fractures of the transverse process are simply incidental findings in the course of injuries which otherwise cause disability because the muscles that originate on these transverse processes have to do with the function of the back and if force is severe enough to cause a fracture, naturally it also causes some hemorrhage and tear and eventual repair of the muscles that are originally injured and that is what causes the pain and disability.

The fracture as we take these things off in the course of surgery, we remove part of the spine and obviously there is no disability or we wouldn't do it.

Q. Doctor, did you form any opinion as to when this transverse process fracture may have occurred? A. Well, it is not evident in the first set of films which was made either late in March, or I believe more correctly, in April of '58. It was evident in the second set of films which was made in December of '58, therefore it must have occurred somewhere in the interval of time between the two sets of films.

MR. MAZZUCHI: I see.

I have no further questions.

THE DEPUTY COMMISSIONER: Mr. Cooney?

MR. COONEY: I'd like to look at his reports a moment. Let me take a quick look at it.

THE WITNESS: Concerning the dates, here are the notes I made at the time I reviewed the films. I better read it if you are interested.

MR. COONEY: Yes, do.

Doctor, maybe I'd better ask you one or two questions first.

THE WITNESS: O. K.

CROSS-EXAMINATION

By MR. COONEY:

Q. You examined Mr. Dailey on April 23, 1959; correct?

A. That's correct, yes, sir.

Q. In the second paragraph of your report of April 29th, you say on December 3, 1958 after he returned to work, while he was nailing on a wall, back pain recurred?

A. That's what he told me, yes, sir.

Q. Pain is now severe in the middle and left side of the back and across the low back. He is not working at present and has done no work since December 3, 1958.

Dr. Weaver and Dr. Tidler are treating him. X-rays of Prince Georges Hospital were negative for fracture or dislocation. Now, what X-rays are you referring to? A. That is corrected in the next paragraph, Mr. Cooney, as you can see. I regret that I made a mistake but the patient had a broken transverse process through the lumbar area on the left.

Q. You say that is corrected? A. The next paragraph.

251 MR. COONEY: I have no questions.

THE DEPUTY COMMISSIONER: Do you want to say something, Doctor?

THE WITNESS: I want to say these are my notes concerning these famous X-rays.

April, '58, there was no evidence of fracture. December 6, '58, no evidence of fracture, it said, just suspicious radio-lucent line transverse process, L-4.

Re-examined 12-25-58, spot film, fracture through tip of L-4 on the left. 12-7-59, a year later, no change of position of fracture. Silent causal—

BY MR. COONEY:

Q. Doctor, may I ask you, please, when you started to read those dates, would you please read them again, the first two or three, to me and also what your notes stated there? A. April, '58, narrowing of L-3 disc, incomplete fusion of congenital block.

Q. I am referring to your X-rays. A. That's what I am talking about. That's what I am reading, my notes concerning the X-rays.

Q. That's right. A. O. K.

Congenital block vertebra: Fusion of lumbar spinous process.

I submit, Mr. Commissioner, that there is a congenital anomaly of the spine which is symptomatic and it doesn't produce any disease disability or symptoms or anything.

12-16-58, this was the first films in December, '58, no evidence of fracture, suspicious line on transverse process of L-4; this was not noted in April of '58.

Q. Do I understand that on December 16 of 1958, it was your opinion that there was no evidence of a fracture? A. As of those pictures and it was the opinion of the radiologist. However, when the films were repeated nine days later in what is called a spot film in which the X-ray is concentrated in a very much smaller area, there was the radiologist's opinion and my opinion was that there was a fracture of the tip of the 4th lumbar spinous process.

THE DEPUTY COMMISSIONER: All right, Mr. Intrater.

CROSS-EXAMINATION

BY MR. INTRATER:

Q. Doctor, have you in your practice experienced many fractures of the transverse process? A. Have I experienced them personally, individually, or seen patients?

Q. In your practice have you experienced? A. Do you mean have I seen patients who have fractured transverse processes?

Q. That is what I mean. A. Many times.

253 Q. What is the normal course of healing in such a case? A. You mean of the bone itself?

Q. Yes. A. The bone itself frequently does not heal.

Q. Now, under those circumstances, is there anything significant with regard to trying to determine the time of onset of a fracture? Is there anything significant in the date of the appearance of bony substances in the fracture site? A. You mean of evidences of healing?

Q. Yes. A. Can one deduce backward from the degree of healing of when a fracture had occurred?

Q. Yes. A. You can approximately, but not except within a broad space of time. I would say not more than a couple of weeks or something like that. You can't say exactly what date it happened.

Q. I don't mean as to a date. Can you say within a question of weeks? A. I would say within a month you should be able to peg it but not beyond that. I mean a period of time in which it is possible to determine should not have an error of greater than one month.

Q. Have you made any determination in this case?

254 A. From examining the callous afterwards?

Q. Yes. A. I would not in this particular instance. I don't think it is necessary because you have films in which one instance show fracture and in a previous instance don't. And as far as expressing an opinion from the callous and the films taken a year later as to when the fracture occurred, I would defer to a radiologist.

Q. Your experience then with regard to examination of X-rays, do you string along with the opinion of an experienced radiologist; is that correct? A. Concerning the matter of callous and deducing backwards.

Q. You are talking about callous, aren't you? Isn't that what you are talking about? A. Yes. Yes, I would defer to an opinion of the radiologist concerning the exact length of time a certain degree of callous in a fractured bone would indicate, right.

Q. Is it my understanding that at the time of the examination of the X-ray of December 16, 1958 that at that time neither you nor Dr. Stecker believed there was a fracture there? A. Could I see a fracture line?

Q. Didn't Dr. Stecker report there was a suspicious radiolucent line? A. That is not a diagnosis.

That's just a suspicion. Neither Dr. Stecker nor I could see a fractured line. That doesn't necessarily mean necessarily beyond any question of proof it was not there but that's all I have to go by.

Q. What do you mean that doesn't prove? A. What I just said. I couldn't make it any more specific.

Q. I'd like to you explain why shouldn't you see a fracture if it is there? A. Sometimes the angle of the film prevents you from doing so, obviously.

Q. It is not obvious to me. That's what I am asking you for. You mean it is possible to take an X-ray of a fracture and not see the fracture? A. Of an insignificant fracture, yes.

THE DEPUTY COMMISSIONER: Let's talk specifically about the fracture in this case.

THE WITNESS: Correct.

BY MR. INTRATER:

Q. You mean to say it is possible to take a picture of a fracture in this case and look at the X-rays and say there is not a fracture there? A. If it is an insignificant fracture, frequently.

Q. I will interrupt him. He is not responsive.

You are saying if there is an insignificant fracture. I don't want anything prefaced. Let's talk specifically about the fracture in this case.

You saw the X-rays, you are familiar with the fracture in this case. Is it your testimony it is possible to take an X-ray of the fracture existing in this case and the X-ray pictures not show it? A. They did in retrospect. The suspicious line referred to by Dr. Stecker and with which

I agreed when a spot film was made of this area proved to be a fracture.

Q. Well now, you stated a little while ago when I asked you about that suspicious line that that was merely a surmise on the part of the doctor? A. No, it was a conjecture which was proved by the spot film.

Q. That's right. The spot film showed it.

Is it your testimony this first film did not show it? A. In retrospect it did but looking at the X-rays at that time without a second film as a follow-up, one would not be able to say definitely and unequivocally that was a fracture. But after the spot film had been made of this area—

Q. (Interposing) Obviously after the film was made. A. May I finish?

THE DEPUTY COMMISSIONER: Proceed.

THE WITNESS: Can you wait a minute?

After the spot film was made of this area, then in
257 going back to the films of December 16th, it became
evident that this suspicious radiolucent area was
indeed a fracture line.

BY MR. INTRATER:

Q. Did you yourself when you examined the X-rays of December 16, 1958, see any suspicious area? A. Yes, exactly. Our opinion is the same. My opinion is the same as Dr. Stecker who incidentally is a very competent radiologist as is his associate.

Q. Have you had any discussion in this case with Dr. Neviaser about this patient? A. Not to the best of my knowledge, no.

Q. Now, you say that you have observed many fractures of the transverse process? A. Yes.

Q. Could you state what type of occurrence could cause a fracture of the transverse process? A. Something, in my opinion, involving direct trauma to the area. Now, it is true that people who do weight lifting and various

other muscular activities in which the back muscles may be contracted rather violently and suddenly can tear off the tip of these transverse processes. I know that is true. I have seen the result of direct trauma to the area. But weight lifters and I can imagine, some similar activities can actually evulse the tip of a transverse process similar to what is seen here.

258 Q. Dr. Stecker suggested cases in which golfers merely with a swing of a golf club— A. Similar to what I am just saying.

Q. He also testified that cases of coughing have caused this? A. I wouldn't know. It is possible.

Q. Would you corroborate that? A. I would concede it is possible but I don't know.

Q. What about cases of a severe muscle spasm? Would you say that could do it? A. You mean muscle spasm per se?

Q. Yes. A. Not a sudden violent muscular contraction but muscle spasm secondary to irritation or something of that kind. I already talked about that that could do it.

Q. Doctor, you testified that the X-rays revealed that this congenital condition was asymptomatic? A. No, I didn't say the X-rays revealed that. I said that is my opinion of such congenital defects and it is supported by the work done at the Mayo Clinic by Professor Gormley, the Professor of Orthopedic Surgery.

Q. You are referring now to a general classification of a specific type of congenital condition that he has that this specific type of congenital condition is asymptomatic? A. Correct.

259 Q. And to be perfectly clear on the record, by "asymptomatic," you mean it is pain free? A. Yes.

Q. And is it your opinion this type of condition when you say it is asymptomatic is also asymptomatic throughout the lifetime of a patient? A. It does not weaken the spine, in fact it strengthens it, this type of vertebral fusion.

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260 BY MR. INTRATER:

Q. You testified before that the straight leg raising test is most significant ordinarily? A. Is significant, yes, sir.

Q. Ordinarily. Would you explain what "ordinarily" is revealed by the leg raising test and why this test is significant? A. Well, if there is genuine limitation of motion and not resistance as in this case, if there is severe pain induced by such leg raising radiating down the sciatic nerve and other signs and symptoms and the general demeanor and activity of the individual is supported, such straight leg raising test is of considerable interest in determining whether or not one of the nerve roots in the lower lumbar spine is compressed by boney overgrowth in the vicinity of a ruptured disc or something like that.

Q. Then this is significant only with regard to a—the compression of nerve roots? A. Not only. This is the principal thing but other things too of course, for example, a child with a tumor of the bone and the hip will complain of pain on straight leg raising. Tuberculosis hip will be painful, inflammation of the back will be, yes.

Q. If there is genuine limitation of motion or limitation of the leg raising, what would cause such limitation? A. You mean involuntary limitation of motion?

Q. Yes. A. What I have just been saying, boney tumors, inflammation of the hip joints, et cetera.

Q. I don't think I made myself clear. A. Yes, your question is correct.

Q. What I meant was this, is there anything besides pain that would limit the leg raising? A. Oh, sure. If a person has a fused hip, you couldn't raise his leg up.

Q. No, no, no. A. That is an answer to your question.

Q. I obviously am not getting across to you. I'll try to make it clearer. A. Please do.

Q. Assuming a situation in which you are seeking to discover something wrong with a man's back such as nerve

root, disc, et cetera, as you have described, and it turns out that the man starts to raise his leg in a straight leg raising test and then at a certain point, stops. Now, without the situation of a fused spine or something like that but perhaps a nerve root involvement, what is it that causes him to stop? Is it pain that causes him to stop or something else that causes him to stop in the leg raising? A. You
 262 said when the man raised his leg. Do you mean when the doctor, the examiner raises his leg; is that what you are saying?

Q. That's correct. A. That is the straight leg raising test, not what you said. The test is the passive raising of the leg. That is what you are talking about. Is that what you mean?

Q. That's right. A. The limitation of straight leg raising when valid and when positive is ordinarily due to pain, yes. It can be due to the involuntary production of muscle spasm in the back which of course is evident that the—muscles swells up and so on, but usually it is due to pain.

Q. In other words, what happens then is that the doctor starts to raise the leg and at a certain stage, the patient either by an involuntary motion or by merely telling the doctor, the patient somehow notifies the doctor that he is in pain; is that correct? A. In cases in which the nerve root is compressed, yes, that is the usual course.

Q. And then when the doctor is notified, that is the only way the doctor then knows the patient tells him he is in pain; is that correct? A. There are other types of involuntary activities which ordinarily accompany this.

MR. INTRATER: That's all my questions.

263 EXAMINATION BY THE DEPUTY COMMISSIONER

Q. Dr. Murphy, assume that Dr. Dailey on March 28, 1958 fell approximately 18 inches off of a scaffold to his hands and knees. A. Not on his back?

Q. On his hands and knees. A. On what kind of terrain, dirt?

Q. I am not sure. Terrazzo floor, about 18 inches off on to a terrazzo floor on hands and knees. He arose without much pain, if any pain at all in his back, and that in approximately five or ten minutes later while pulling on a piece of channel iron, he felt a severe pain in his back and he was off work for approximately three weeks.

He returned to work on April 21, 1958. An X-ray was taken of his back on April 5, 1958 without any disclosure of a fracture. He returned to work on April 21, 1958 and he continued to work for that same employer until some time in June of 1958 and then he went to work for another employer in the capacity, I believe, of a foreman and he worked there until some time in October, 1958.

He didn't have to do much bending or lifting. He further testified that when he returned to work for this employer where he was hurt on March 28, 1958, the foreman didn't favor him with light work but his fellow-workers helped him after he returned.

264 After some time in October, 1958, he went to work for another employer and on December 3, 1958, while working for this other employer and in his job he was required to bend and stoop while nailing lathes to a wall, and around 1:00 o'clock in the afternoon of that day he told the foreman of the job that his back was paining and he would not be able to keep it up and he would have to go home.

X-rays were then taken, I believe, some time in December and then on December 25, 1958, a spot film revealed a fracture of the left 4th lumbar transverse process. A. Excuse me for interrupting. That is confirmed, the nature of the suspicious line seen nine days before but not seen in the first films at all.

Q. Yes, sir. A. Right.

Q. Dr. Murphy, as a physician and as a specialist in neurosurgery, let me have your opinion as to whether or not it is within the realm of medical reason, is it not possible for this fracture to have occurred on March 28, 1958?

MR. MAZZUCHI: Just a moment, Doctor.

If the Deputy Commissioner please, I believe Dr. Murphy should also be furnished with the information that Dr. Stecker gave that after the discovery of the fracture line in December of 1958, there was a showing of bone formation and healing of the bone which did not exist
265 in the X-ray of April of 1958.

MR. INTRATER: That showed up in X-rays in March of 1959.

THE WITNESS: Yes, that was in '59 Mr. Mazzuchi.

Well, can I go ahead.

THE DEPUTY COMMISSIONER: Yes.

THE WITNESS: That is germane to what I am going to say because to go back to this famous translucent line, that was not present in the first films at all. It was present in the second set of films and spot film confirmed the fact that it was indeed a fracture, this minor thing in the transverse process.

Had that occurred in March, that fracture on the spot film would have shown some callous formation at that time because that was nine months later, plenty of time for X-ray evidence of healing to have occurred. So this fracture obviously in my opinion occurred between the two occurrences referred to. I mean the two sets of films referred to, because not only was no "suspicious radiolucent line" or anything else seen on the transverse process of L-4 in the first set of films in April of 58, but there was no evidence of callous in the second set of films which did show it for the first time meaning relatively fresh, or something like that.

BY THE DEPUTY COMMISSIONER:

Q. Assume, Dr. Murphy, that there is no evidence
266 of any direct trauma. Assume that there is no unusual twisting or any unusual gross activity between April 5, 1958 and December, 1958 when Dr. Stecker took the first X-ray. What is your opinion as to whether or not it is reasonably medically possible that the fracture could

have been the result of the fall from the scaffold to the hands and knees on March 28, 1958 and the pulling of the piece of channel iron subsequently thereto on the same date? A. Both of which events occur before the taking of the first set of films?

Q. Yes. A. It is my opinion neither of those events could have been responsible for that fracture that appeared in December of '58 at all.

Q. What caused it? A. It may be something else. Occasionally you find transverse process fractures in somebody that gives no history of back injury or anything else. I mean something happened in the ordinary course of our activities. There is such a thing as a stress fracture. It can occur in the foot, it can occur in the rib, it can occur in the arm, it just happens, boom!

Q. Was this a stress fracture with Mr. Dailey? A. I am not saying.

Q. What kind of a fracture did Mr. Dailey sustain?

267 A. A Minor crack through the tip of the transverse process which is a relatively non-functioning part of the spine. When we see them as incidental findings in patients who have their back X-rayed for a variety of reasons, kidney examination or GI series, often it is not associated with the history of injury at all.

Q. Could he have continued his work, Dr. Murphy, after he returned to work on April 21, 1958 with pain as he alleges he suffered with this fracture present? A. Had the fracture been present in April of '58.

Q. Yes. A. Which I am sure it was not.

Q. Yes, sir. A. Yes, he could have worked with it. It is not an incapacitating thing. The problem is the muscle hemorrhage and such that happens at the time and that clears up in about six weeks. That part of the spine is not of particular importance. That transverse process, we take them off, as I say.

Q. Would that cause pain? A. The fracture?

Q. Yes. A. It shouldn't.

Q. Would the acute lumbosacral sprain which Mr. Dailey suffered as a result of the injury of March 28, 1958, superimposed upon an anomaly between the lumbar 3rd and 4th vertebra be sufficient to cause Mr. Dailey adequate pain to keep him for work without a fracture? A. For how long?

Q. From March 28, 1958 until April 20, 1958? A. Yes, that's perfectly possible. A lumbosacral sprain can do that. Pardon me, to reiterate, this congenital anomaly does not weaken his spine, it strengthens it. The surgeons perform fusions for the strengthening of spines. This is a fusion.

But you ask, could a lumbosacral sprain cause him to be off that period of time. Sure, it could.

Q. Would it leave him with any residual disability without a fracture? A. Without a—

Q. Without the fracture? A. You mean with the lumbosacral sprain per se and in and of itself?

Q. Yes. A. No.

Lumbosacral sprain clears up, fortunately.

Q. Doctor, I want you to tell me as a physician, what do you believe to be the origin of this fracture of the left transverse process of the 4th lumbar vertebra? A. To be very frank with you, I would not swear in court exactly what in my opinion caused it.

269 Q. Doctor, as a physician and a specialist in neurosurgery— A. (Interposing) I know approximately when it showed up at first.

Q. (Continuing)—is it possible it could have been caused by the fall from the scaffold to the ground on his hands and knees and the subsequent act in pulling this piece of channel iron? A. And not show up in the first set of X-ray films? No, it is not.

THE DEPUTY COMMISSIONER: All right.

MR. INTRATER: Please let me ask a few other things.

THE DEPUTY COMMISSIONER: All right.

FURTHER CROSS-EXAMINATION

BY MR. INTRATER:

Q. Suppose Mr. Dailey had an episode of muscular shaking and quivering severe enough to awaken his wife, would such muscular activity cause such a fracture as occurred in this case? A. You mean a true convulsion, epileptic seizure?

Q. No, not an epileptic seizure. A. No, then it could not.

Q. Doctor, just to be completely clear on this thing, are you ruling out entirely the congenital condition which this man has from any pain disability or anything which
270 he has? A. Correct.

Q. As completely out of the picture as a causative factor? A. Right.

Q. Now, one other thing. You testified before that sometimes these transverse process fractures, they never heal? A. Right.

Q. And sometimes they do show healing? A. Yes.

Q. Under those circumstances, would you explain how when there is some healing in view of the fact that sometimes they never heal, how that healing can be used to determine the existence, the length of existence of the fracture? A. Because bone is laid down and when it is laid down, it is a predictable rate.

Q. In other words, either it will not be laid down at all, or if it is laid down, it is at a predictable rate? A. It should be, yes.

THE DEPUTY COMMISSIONER: Any further questions?
You may be excused, Dr. Murphy. Thank you.

195

Joint Exhibit No. 1

HAROLD S. TIDLER, M.D.
6480 New Hampshire Avenue
Takoma Park, Maryland

December 14, 1959

U. S. Fidelity & Guaranty Co.,
930 Woodward Building
Washington 5, D. C.

Re: Wilburt E. Dailey
vs: Novinger Company, Inc.

Date of injury: March 28, 1958

Date of Examination: December 9, 1959

Gentlemen:

With reference to the above-named, the following supplemental report is submitted:

Mr. Dailey states that he is working regularly as a foreman supervisor doing lathing work. If he works bending over for any length of time he has trouble with pain in the left lower part of his back. This is relieved by standing up and walking around. He also notices pain in the same area on coughing or when his car bumps on a rough place in the road.

There is no radiation of pain except across the lower back area. He is not troubled with pain at night and sleeps well. In his present work he walks upstairs to the eighth floor as the building has no elevator in service. He
196 states he is able to do this when he needs to but could not be going up and down stairs all day because it would hurt his back. He states that if he steps down with his right foot from a low scaffolding he feels pain in the left side of his back. He has noted no weakness or paresthesias.

The patient states he is able to work at his present job because as a supervisor he is able to stand up and walk around when his back hurts from bending over. However he does not believe he could do lathing work that required him to work continuously in a bending position.

On examination the patient is ambulatory with a normal gait and appears to be in good general condition. He stands with good posture. The Rhomberg test is negative. On forward bending the finger tips reach just below the knees. Left lateral bending is limited. Right lateral bending is normal. There is tenderness on deep pressure in the left paraspinal area lateral to the fourth lumbar spinous process. There is also slight percussion tenderness over this area.

The straight leg raising test is normal on the right and limited at 50 degrees on the left by pain. The reflexes were normal in lower extremities. The motor power was decreased in the left lower extremity as compared to the right.

Mr. Dailey's condition on this examination as evidenced by the history and physical findings shows no remarkable change from his condition on previous examinations during the past twelve months. Because of the location of pain and tenderness in the left lumbar and left lumbosacral regions of the spine, Mr. Dailey was again advised that he should have intravenous pyelogram studies made to determine the condition of his urinary system. He was asked to notify me when he is ready to have this study done and was told that I would make the necessary arrangements for this at Prince Georges Hospital.

Very truly yours.

/s/ HAROLD S. TIDLER, M. D.
Harold S. Tidler, M. D.

HYMAN D. SHAPIRO, M.D.
Farragut Medical Building
800 - 17th Street, N. W.
Washington 6, D. C.

January 21, 1958

RE: Wilbur Dailey, Age 44, Lather.
Ref By: Dr. Julius Neviaser

NEUROPSYCHIATRIC CONSULTATION:

Date of Examination: January 16, 1959.

CHIEF COMPLAINTS: "Pain in the back, in the 4th vertebra on the left side and it goes all over my back."

FAMILY HISTORY: Father died at the age of 69 of an undetermined condition, "probably cancer." Mother living and in good health, age 64. One sister age 40 and in good health. No siblings dead. He was married the first time in 1936 and separated in 1950. "She picked up and went off. She was drinking all of the time." He obtained his divorce in 1952. Remarried in 1953. Present wife is 40 years of age and in good health. He has 6 children by his first marriage who have been with him all of the time since his wife left and also has two children with his present wife.

PREVIOUS HISTORY: Born in Fairfax County, Virginia, 7-24-14. Has lived in this area all of his life. Quit high school in the third year at the age 16, "I just
199 quit that is all that I can say." He worked as a helper in restaurants in D. C. for two years and then ran a gasoline station for two years and then went to work as a lather and has been doing this work ever since. He states he has worked for one contractor for many years. He advises me he was exempted from Military Service, "on account of nerves and essential work." He states his official papers however read, "essential work."

PREVIOUS ILLNESSES: Chicken pox and mumps in childhood. Denies ever having any serious illnesses. No operations. No previous serious injuries. Denies neuro-pathic traits in his development. Habits:—10 cigarettes daily. Very little alcohol. When asked to tell me just how his "nerves" were a factor in his being rejected for Military Service he answers, "I can't tell you. I didn't see the paper. The Lieutenant who examined me told me he was turning me down for service on account of my nerves. I don't know what nervousness I had. I did not know I was nervous."

PRESENT ILLNESS: On March 28, 1958, on a Friday about 3:30 to 4:00 PM he states he fell over a scaffold board which threw him and caused him to fall, "between 18 and 24 inches." He states he was not cut or bruised. He states he fell on his hands and knees; was not unconscious or dazed. In about two to five minutes later he noticed a pain in his back as he was picking up some channel iron that is used in lathing. He states it was almost quitting
200 time. He stayed on the job up to quitting time about 4:00 P.M. and then went home. He got home about 4:45 P.M. It was at this time he states that he had a lot of pain in his back especially the spot in the back, low down which is the same area as pains him now. He states his wife called a Dr. Frank Weaver as he had had to go to bed with this pain. He is unable to tell me when he saw Dr. Weaver but thinks that it was "one or two days or so after" that the doctor came to his house. He was unable to leave his bed on account of the pain in his back. He states that the doctor gave him a shot, "to quiet me down and kill the pain." He is unable to tell me how long he stayed in bed but it was about "two or three days." He states that the doctor came to the house "a couple or three times." He states that he gave him medicine to kill the pain. All together he was off work about three weeks and saw Dr. Weaver during this time for diathermy at his office daily. He claims that he felt better when he went back to work

but "that place in the lower part of my back still pained." He states that it interfered with his work as he could not bend over at work without bending his knees. If he did that he "still had a little pain" in his back. He went back to the same job on which he was injured on 3-28-58 in three weeks. This was the Senate Office Building with a Novinger Company. He stayed on this job until the early part of June when the job was about finished. He advises me that they started on the job with 50 or 60 lathers but that "I, the foreman and one other lather were the last ones on the job."

He states after the job was finished at the Senate Office Building he went to work as a lather foreman with a James P. Conway Company building a motel at New York Avenue and Bladensburg Road. He stayed on this job until it was finished sometime in October. He states during this time "I was still having some pain with bending." From this job he went to work as a lather with a Floyd Mitchel Company on a job at Catholic University and following this he went on another job at Georgetown Hospital with the same company and from there shifted to another job at Casualty Hospital. In all he was continuously employed except for the three weeks he was out following his injury on 3-28-58. It was while working on the job at Casualty Hospital on December 3, 1958, that he states he developed a severe pain in his back and he had to quit. He denies having any further injuries on these other jobs. Also it is noteworthy that he required no medical attention after the first three weeks following his injury on 3-28-58. Dr. Weaver was the only doctor he saw during that time. When asked why he did not have any further medical attention in view of his complaints of "some pain" during this period between April 1958 and December 3, 1958, he answered, "I figured that the pain would leave."

He states that on 12-3-58 while nailing some metal laths on a sidewall about 1:00 or 2:00 P.M. he developed a sudden severe pain "in the same spot in the lower back." He com-

pleted the day at his job and went home and went to bed. He did not call Dr. Weaver or any private doctor but he states his wife called the insurance company and they wanted him to go to a hospital he alleged. He states that his wife wanted to know if the bills would be authorized and when told that this could not be guaranteed, he states that he then called the Labor Board the same day and that the insurance company sent a Doctor Tidler to his home the same day. He examined him and gave him no treatment and told him to come to the office when able. He states about two or three days after December 3, 1958, he went to Dr. Tidler's office where he was treated with diathermy to his back and he is still being treated by this doctor. He had diathermy two to three times a week. He states his last visit to Dr. Tidler was on Monday, January 12, 1959. He was to see him again on January 17, 1959. In the interval he states he was sent to Dr. Neviaser who examined him and gave him a back support but no other treatment. He states that Dr. Neviaser told him that the X-rays showed an old deformity of the two lower vertebrae and
 203 that it was something about a "congenital fusion of the third and fourth lumbar." He states however that he had spot X-rays made at Prince Georges County Hospital where all of his X-rays were made. He alleges that the X-ray man at the hospital found on the spot X-ray something about a tip or an extension of the fourth vertebra being broken off. On the other hand he states that Dr. Neviaser told him that there was no fracture but a congenital condition.

On an inquiry whether he had ever had any treatment to his back prior to March 28, 1958, he now admits to having had a "sacriliac" which he states occurred "years ago" he cannot tell just when but it was in the "early 1950's." At that time he stepped off a scaffold and he states that his sacriliac "jumped out of joint." He was treated by a Dr. Talbert. He does not know how long or how many times he saw Dr. Talbert for this condition but states that

he was back to work in three days and has had no further trouble with it.

PRESENT COMPLAINTS: Pain in back "mainly in the fourth vertebra on the left side (he points to his left lumbar region) and it goes up my back, which at times goes into the right side and at times into the left side of my neck." He states that the pain is not constant. He gets it at least once a day. Interestingly, he states the pain is worse in getting up from a sitting position after he has been sitting for a long time. He states he has to shift his weight to the left side when he gets up after sitting for a long time because it seems to draw me to the left when I get up" He states however that pain in the "4th vertebra" is present all of the time since his first injury in March, 1958, but that it is "more severe at times." He states that he has done no work since December 3 because the pain in the back is "so damn severe that I couldn't work." He again tells me that the pains in his back radiate to the right or left neck and last only a few minutes but that he always has pain in the fourth vertebra. When asked if there is any difference now in his pain between what he had in March and April 1958 and after the episode on December 3, 1958, he states "it is more severe since December. In addition to the pain in that spot it now goes all over my back."

NEUROLOGIC EXAMINATION: The station and gait is normal. He undresses completely in the examining room without difficulty including getting off his shoes. He gets on the examining table without difficulty. However, in dressing after the examination he stated that he had to sit in a chair in order to put on his shoes. Forward bending was moderately limited. Straight leg raising was limited Bilaterally, more on the left. He claims that he has pain in the "fourth vertebra" on the left no matter whether he tries straight leg raising on either the right or left.

205 Also in the Patrick maneuver (for hip joint disease) he states that this maneuver also causes pain in his

left fourth vertebra." This is more prominent with the Patrick maneuver on the left but he also complains of pain in the fourth vertebra on the left whether this maneuver is done on the right or left. His pupils were equal and reacted well to light and accommodation. His extra ocular movements were normal. His fields were full. The Weber was normal. The motor examination in his upper extremities showed no abnormalities, they being of equal strength. On rotating his head I could find no limitation of motion but he gave me a history that at times when he turns his head to the right or left he gets a "catch or spasm that catches me for a second and then I turn my head to the center and it is gone." He states he had this only in the last week. His strength in his lowers is normal. He shows no pathological reflexes. From an emotional standpoint he shows no alteration of mood. In taking his history his replies are frequently punctuated by "damn" and "how in the hell." This reference is as to why the doctors who have examined him are unable to find any fracture of his spine or organic injury. He showed no evidence of any emotional abnormality or anxiety.

DIAGNOSTIC IMPRESSION: There is no evidence
206 of any organic disease of the nervous system.

From a psychiatric standpoint he does not fit into any known psychoneurotic picture or any post-traumatic nervous classification. He gives a rather bizarre history of his complaints. He keeps constantly referring to pain in his "fourth vertebra on the left side." The radiation of this pain up to his neck on either side from the lower lumbar region, is certainly not explainable to any anatomical basis. His history of being exempted from Military Service on account of "nerves and essential work" may possibly indicate that he had a basic neurosis or personality disorder. However, on the basis of his history and my findings I cannot classify him in any known psychiatric classification. It is interesting to note that when he had his injury on March 28, 1958, he did not have disability which required

treatment for more than three weeks, and then he was able to go from approximately the middle or latter part of April, 1958, up to December 3, 1958, with symptoms of only a "little pain" in his back up to the time of the acute episode on December 3, 1958. Considering the type of injury he had, and his medical history since the time of his injury on March 28, 1958, I am unable to tie this in with the acute onset of his present back pains that he complains of with the original injury. His neurologic examination suggests the possibility of considerable conscious overlay of
207 symptoms. This especially so in that a straight leg raising on both sides and the Patrick maneuver on both sides all cause him he states pain in his "left fourth vertebra." If, as reported, he shows no orthopedic evidence of disease and the X-rays show only a congenital deformity of his lower spine, I am unable to account for his symptoms. This is not a neuropsychiatric condition. As stated I cannot find any evidence in the history in my examination to indicate that he has any organic or functional nervous disorder as the result of the injuries claimed.

/s/ H. D. Shapiro
H. D. SHAPIRO, M.D.

(Stamp)
RECEIVED
APR. 15, 1959
D.C.C.A.

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

CIVIL No. 223-62

NOVINGER, INC.

Plaintiff,

vs.

CHARLES EINBINDER, Deputy Commissioner

Defendant.

Notice of Appeal

Notice is hereby given this 2nd day of November, 1962, that Charles Einbinder, Deputy Commissioner hereby appeals to the United States Court of Appeals for the District of Columbia from the judgment of this Court entered on the 4th day of September, 1962, in favor of Novinger, Inc. against said Charles Einbinder, Deputy Commissioner,

/s/ David C. Acheson
DAVID C. ACHESON
United States Attorney

Attorney for

CHARLES EINBINDER
Deputy Commissioner

Send Copy to:

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